No. 89-1784

Supreme Court, U.S.
FILED
AUG 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA and
KERWICK & CURRAN, INC.,

Petitioners,

v.

BEN COOPER, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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The State of Pennsylvania

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Kerwick & Curran, Inc.

PETITION FOR CERTIORARI FILED MAY 8, 1990
CERTIORARI GRANTED JUNE 28, 1990

BEST AVAILABLE COPY

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GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DATE	FILINGS — PROCEEDINGS 89-5026
7-27-89	Copy of district court docket entries and notice of appeal on behalf of Appellant BEN COOPER INC., Filed.
7-27-89	Appellants BEN COOPER INC, Form C Filed. (W/pfs and COPY OF D.C. ORDER) (RECEIVED ON 7-19-89)
7-27-89	Appellants BEN COOPER INC, Form D, Filed. (RECEIVED ON 7-19-89)
8-1-89	Copy of receipt re: payment of docketing fee in district court, Filed.
8-10-89	SCHEDULING ORDER #1, FILED.
8-30-89	Record on appeal filed (original papers of the district court)
9-11-89	Appellants BEN COOPER, INC., --- brief filed (w/pfs)
9-11-89	Appellants BEN COOPER, INC., --- joint appendix filed (w/pfs).
10-10-89	Appellees KERWICK & CURRAN, INC., AND KALVIN-MILLER INTERNATIONAL, INC brief filed w/pfs
10-10-89	Appellee THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA brief filed w/pfs
10-24-89	Appellant Ben Cooper, Inc. reply brief filed w/pfs.
11-27-89	Appellant Ben Cooper Inc motion for adjournment of oral argument filed (all to cal. 11/27)
11/29/89	Order DENIED Appellant BEN COOPER INC motion for adjournment of oral argument FILED.
12-21-89	Case heard before TIMBERS, CARDAMONE, PRATT, C.JJ. (tape #99)
2/7/90	Judgment reversed and remanded by Published Signed Opinion field (WHT)
2/7/90	Judgment filed
	Mandate Issued (judgment and opinion)

CIVIL DOCKET
SOUTHERN DISTRICT OF NEW YORK

DATE	NR.	PROCEEDINGS
5-26-89	89	BEN COOPER, INC. v. THE INS. CO. OF THE STATE OF PENN., et al.: Fld. Memo of Law in support of the motion of deft. The Ins. Co. of the state of Penn. for relief from the May 24, 1989 Bankruptcy Court Order.
6/2/89	90	BEN COOPER, INC. v. THE INS. CO. OF THE STATE OF PENN., et al.: Fld. Notice of Cross-Motion for an order withdrawing the reference of the adversary proceeding commenced by debtor Ben Cooper, Inc.
6/2/89	91	BEN COOPER, INC. v. THE INS. CO. OF THE STATE OF PENN., et al.; Fld. Memo of Law in opposition to motion of deft. The Ins. Co. of the State of Penn. for relief from the order of the Bankruptcy Court.
6/2/89	92	BEN COOPER, INC. v. THE INS. CO. OF THE STATE OF PENN., et al.: Fld. Memo of Law of deft. Kerwick & Curran, Inc. in support of its cross motion for withdrawal of the reference of the adversary proceeding.
6/5/89	93	BEN COOPER, INC. v. THE INS. CO. of the STATE OF PENN., et al.: Fld. Transcript of Proceedings before Judge Walker, dated May 31, 1989.
6/21/89	100	IN RE: BEN COOPER, INC.: Fld. Memo of Law in support of the motion of deft. The Insurance Company of the State of Pennsylvania for relief from the May 24 and June 15, 1989 Bankruptcy Court orders.

DATE	NR.	PROCEEDINGS
6/30/89	101	IN RE: BEN COOPER, INC. Fld. O.T.S.C. with a Stay . . . it is ordered that Ben Cooper, Inc., show cause on July 11, 1989 why an order should not be entered stay in whole or in part the orders of the Bankruptcy Court. . . . LEISURE, J.
6-30-89	102	IN RE: BEN COOPER, et al: Fld notice of cross motion; take notice that the undersigned will cross-move this Court on behalf of deft Kerwick & Curran on 7-11-89 at 10:00 am . . . for an order granting leave to appeal.
6-30-89	103	IN RE: BEN COOPER, et al: Fld memo in support of doc#102. JL
7-11-89	----	IN RE: BEN COOPER, et al: Fld memo-end on doc #101; after hearing the parties this application is granted as stated upon the record in open Court today. STANTON J Dtd 7-11-89. JL
7-11-89	----	IN RE: BEN COOPER, et al: Fld memo-end on doc #102; granted as indicated upon the record in open Court this morning after hearing. STANTON J Dtd 7-11-89. JL
7/21/89	104	IN RE: BEN COOPER, INC.: Fld. Transcript of Proceedings before J. Walker, dated 5/31/89.
7-18-89	106	IN RE: BEN COOPER: Fld notice of appeal: Notice is given that Plntff Ben Cooper hereby appeals to the U.S. Court of Appeals . . . from the order entered 7-11-89. JL
7-7-89	107	IN RE: BEN COOPER, INC: Fld memo in reply to Debtor's opposition to the motion. JL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos,:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Adv. Pro.
No. 89-5685A

ORDER TO
SHOW CAUSE

Upon the annexed affidavit of Philip C. Silverberg, sworn to on June 22, 1989 and the exhibits annexed thereto, and the memorandum of law in support of the June 22, 1989 motion of defendant The Insurance Company of The State of Pennsylvania ("ICSP"), it is hereby:

ORDERED that Ben Cooper, Inc., Light Manufacturing Co., Inc., Aimwell Products, Inc. and Ben Cooper Sales Corp., debtors-in-possession ("Debtor"), show cause before this Court at the Courthouse, located at 40 Centre Street, Room 312, New York, New York, on the 11th day of July, 1989 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can

be heard, why an order should not be entered: 1) staying in whole or in part the May 24, 1989 and June 15, 1989 orders of the Bankruptcy court; 2) granting ICSP leave to appeal pursuant to 28 U.S.C. §158(a) from those orders; 3) reversing the Bankruptcy Court's determination that this adversary proceeding is core pursuant to 28 U.S.C. §157(b)(2)(A) and (L); 4) establishing ICSP's right to a jury trial in the adjudication of this controversy; 5) withdrawing reference of the adversary proceeding commenced by Debtor against defendants from the Bankruptcy Court pursuant to 28 U.S.C. §157(d), thereby vacating the orders issued by the Bankruptcy Court below; 6) determining that this Court abstains pursuant to 28 U.S.C. §1334(c) from hearing the adversary proceeding; 7) dissolving the preliminary injunction imposed by the Bankruptcy Court's May 24 and June 15, 1989 orders; and for such other relief as may be just and proper; and it is further

ORDERED that a hearing be held on the return date of this motion to deterimne the issues raised herein; and it is further

ORDERED that service of this order to show cause together with a copy of the papers annexed hereto on counsel for the Debtor and co-defendants Kalvin-Miller International, Inc. and Kerwick & Curran, Inc. on or before June 23, 1989 at 3:00 P.M. shall be deemed sufficient service.

Issued at 11:00 a.m. on June 23, 1989.

ENTER,

/s/

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos.:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Adv. Pro.
No. 89-5685A

AFFIDAVIT

PHILIP C. SILVERBERG, being duly sworn, deposes and says:

1. I am associated with the firm of Mound, Cotton & Wollan, attorneys for defendant The Insurance Company of The State of Pennsylvania ("ICSP"). This affidavit and the accompanying memorandum of law are submitted in support of ICSP's motion, brought by order to show cause, for an order staying the May 24, 1989 order, as modified by the June 15, 1989 order, of the Bankruptcy Court (Hon. Cornelius Blackshear) (the "Orders"), which are annexed hereto as Exhibits 1 and 2.

2. ICSP's motion seeks an order granting it the following relief: 1) a stay in whole or in part of the May 24 and June 15, 1989 orders; 2) permission pursuant to 28 U.S.C. §158(a), to appeal from so much of the Orders as may be determined to be non-final and non-appealable as of right; 3) reversal of Judge Blackshear's determination that this adversary proceeding is core pursuant to 28 U.S.C. §157(b) (2)(A) and (L); 4) a determination that ICSP is entitled to a jury trial in the adjudication of this adversary proceeding; 5) withdrawal of the reference of the adversary proceeding brought by Ber. Cooper, Inc. ("Debtor") in the Bankruptcy Court from that Court pursuant to 28 U.S.C. §157(d), thereby vacating the orders issued by the Bankruptcy Court below; 6) abstention of this Court, pursuant to 28 U.S.C. §1334(c), from hearing the adversary proceeding; 7) dissolution of the preliminary injunction imposed against ICSP by the Bankruptcy Court; and for such other relief as may be just and proper.

3. The salient facts and circumstances leading to this motion are as follows.

4. The Debtor filed a petition for Chapter 11 bankruptcy in April, 1988.

5. Some time after, Mr. Michael J. Sherman was appointed chief executive officer of Ben Cooper, Inc. to run the company as Debtor-in-Possession under Chapter 11 reorganization. According to Mr. Sherman's affidavits, sworn to on May 8 and May 17, 1989, Mr. Sherman retained two insurance brokers, co-defendants, Kalvin-Miller International, Inc. ("Kalvin") and Kerwick & Curran, Inc. ("Kerwick") to procure several insurance policies for the Debtor covering different risks. A copy of Mr. Sherman's two affidavits appear as part of Debtor's moving papers in the Bankruptcy Court and are annexed hereto without their exhibits as Exhibit 3. Those brokers procured from ICSP a standard commercial property coverage and general liability insurance policy (the "Policy"). A copy of the Policy is annexed hereto as Exhibit 4.

6. Mr. Sherman noted in his May 8, 1989 affidavit that during the procurement process the brokers made material

misstatements of fact and omitted key information when submitting the risk to the insurers, including ICSP. Mr. Sherman noted major omissions from the description of certain aspects of the Debtor's business. (See, Sherman May 8 affidavit at 4-5.) These misrepresentations and omissions are at the heart of the dispute between the Debtor and ICSP because ICSP believes that the Policy is thereby void from inception.

7. On January 6, 1989, there was a small fire at the Debtor's Rossville, Georgia warehouse facility.

8. On or about January 9, 1989, ICSP and the Debtor entered into a non-waiver agreement by which the Debtor agreed, among other things, that ICSP was not waiving any of its rights, including the right to disclaim coverage or otherwise deny the claim by investigating the loss. A copy of the non-waiver agreement is annexed as Exhibit 5.

9. By letter dated January 25, 1989, annexed as Exhibit 6, this firm, as the representative of ICSP, reserved ICSP's rights and requested that the Debtor submit to an examination under oath as part of ICSP's investigation into the circumstances of the alleged loss.

10. Mr. Sherman submitted to examination under oath on March 1, 1989. Even though the ICSP investigation did not conclude that day, the Debtor was aware of ICSP's concerns regarding the coverage and the loss. Moreover, as is evident from the examination transcript, the Debtor agreed to provide additional information concerning the loss, documents regarding coverage, and any further documents concerning the procurement of the Policy. Salient portions of that examination under oath transcript are annexed as Exhibit 7.

11. By letter dated April 13, 1989, the Debtor's public adjuster submitted a damage and business interruption claim of over $2,000,000 as well as supporting documents. Annexed as Exhibit 8 is a copy of that letter without its attachment.

12. On or about April 18, 1989, ICSP commenced an action in the Supreme Court of the State of New York seeking a

declaration that the Policy is void from inception and a declaration that it is not liable for any loss sustained by the Debtor relating to the January 6, 1989 fire at the Debtor's Georgia location. In substance, the suit alleges that the Debtor, through its authorized insurance brokers, made certain representations and submitted certain information to ICSP in connection with the Debtor's request for property insurance for certain specific locations: that the information was false and misleading in that it omitted, *inter alia*, that the Debtor manufactured Halloween costumes and accessories, and further, that the information submitted did not accurately describe the building structures at the locations nor the operations therein conducted. It also appears that there has been exaggeration by the Debtor of the extent and value of the damage caused by the loss, which would give ICSP an independent basis to deny liability. A copy of the ICSP summons and complaint is annexed as Exhibit 9.

13. On April 18, 1989, ICSP mailed a notice of cancellation to the Debtor to cancel the Policy effective June 20, 1989, thereby exercising its right to cancel under the Policy. A copy of the cancellation notice is annexed as Exhibit 10.

14. On May 9, 1989, the Debtor filed an order to show cause and moved for a temporary restraining order in the Bankruptcy Court of the Southern District of New York. The Debtor also moved to commence its own action in Bankruptcy Court against ICSP as well as the two brokers involved.

15. On May 9, 1989, Judge Blackshear entered a temporary restraining order against ICSP staying its state court action, enjoining ICSP from cancelling the insurance Policy, and ordering expedited discovery in the action commenced by the Debtor in the Bankruptcy Court. A copy of the May 9 order is annexed as Exhibit 11.

16. On May 16, 1989, ICSP served its memorandum of law in opposition to the Debtor's motion for a temporary restraining order.

17. On May 17, 1989, oral argument was heard before Judge Blackshear. The Court, in a bench ruling, granted Debtor's

request for a preliminary injunction, directed accelerated discovery, and made other rulings. A copy of the transcript of the May 17 argument is annexed as Exhibit 12.

19. Upon notice to counsel for all parties, ICSP made a motion for relief from the May 24 order by Order to Show Cause on May 26, 1989 to the United States District Court for the Southern District of New York.

20. Defendant Kerwick & Curran joined ICSP's motion to the District Court by Cross-Motion for Withdrawal of the Reference with supporting memorandum on May 30, 1989.

21. On May 31, 1989 the Honorable John M. Walker, U.S.D.J., heard oral argument on ICSP's motion to the District Court. A copy of the transcript of the May 31 hearing is hereto annexed as Exhibit 13. Judge Walker declined to reach any of ICSP's requests for relief until the Bankruptcy Court determined one threshold issue, namely whether this adversary proceeding is core or non-core pursuant to 28 U.S.C. §157(b).

22. Judge Walker stayed all discovery requests under the May 24 order pending the Bankruptcy Court's specific determination on the core versus non-core issue. Judge Walker directed Judge Blackshear to make a determination and stated that ICSP's right to pursue its appeal in the District Court for relief from the Bankruptcy Court would remain inviolate. (Transcript, May 31, 1989 Hearing at 19.)

23. Counsel then submitted further papers to the Bankruptcy Court. Counsel for Kerwick & Curran submitted a brief in support of a motion for finding the action non-core on June 6, 1989. Counsel for Ben Cooper, Inc. submitted two letters on June 13 and June 14, 1989. ICSP submitted a Supplemental Brief on June 14, 1989.

24. On June 15, 1989, the Honorable Cornelius Blackshear, U.S.B.J., heard oral argument from counsel for all parties. A copy of the transcript of the June 15 hearing is hereto annexed as Exhibit 14. Judge Blackshear rendered an opinion from the

bench finding that this adversary proceeding is core pursuant to 28 U.S.C. §§157(b)(2)(A) and (L). Judge Blackshear also ordered discovery calling for production of certain documents on June 20, 1989, and for depositions to be taken on June 28, July 10, July 13, and July 18, 1989 of ICSP, Kalvin-Miller, Kerwick & Curran, and Ben Cooper, Inc., respectively. (See Exhibit 2, June 15 order modifying May 24 order.)

25. We have been advised by Judge Walker's chambers that this motion is to be referred to the Part I judge sitting at the time ICSP's motion is made.

26. For the reasons set forth in the accompanying memorandum of law, this Court should grant ICSP the relief requested and stay the Bankruptcy Court's Orders until such time as this Court can review the issues raised in ICSP's present motion.

/s/Philip C. Silverberg
Philip C. Silverberg

Sworn to before me this
22nd day of June, 1989

/s/Irene Siegel
Notary Public

IRENE SIEGEL
Notary Public, State of New York
No. 41-4872330
Qualified in Queens County
Commission Expires October 14, 1990

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Assigned to
Hon. Cornelius
Blackshear

COUNTER-
ORDER FOR
PRELIMINARY
INJUNCTION

Ben Cooper, Inc. ("Debtor") having moved the Court for a temporary restraining order and preliminary injunction enjoining the defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with them, pending the final hearing and determination of the adversary proceeding No. 89-5685A (the "Adversary Proceeding"): (i) from prosecuting the action commenced on or about April 18, 1989 in the Supreme Court of the State of New York, County of New York, entitled *The Insurance Company of the State of Pennsylvania v. Ben Cooper, Inc.* (ICSP) (the "State Court Action"); (ii) from terminating the Debtor's insurance policy issued

effective October 1, 1988 with defendant The Insurance Company of the State of Pennsylvania (a copy of which is annexed as Exhibit A to the complaint in the Adversary Proceeding and as Exhibit C to the affidavit of Michael J. Sherman, sworn to May 9, 1989), – including the provision of coverage for the manufacturing facilities and locations of the Debtor and its affiliate; and (iii) directing expedited discovery of the defendants; and

The Court, on May 9, 1989, having entered, on good and sufficient notice to defendants, the Order to Show Cause and Temporary Restraining Order; and a hearing on the Debtor's motion for a preliminary injunction having been held on May 17, 1989; and the Court having heard and considered the arguments of Lowenthal, Landau, Fischer & Ziegler, P.C. (Lawrence L. Ginsburg, Esq., of counsel) for the Debtor and Mound, Cotton & Wollan (Costantino P. Suriano, Esq., of counsel) for defendant The Insurance Company of the State of Pennsylvania, Jackson & Nash (Victoria A. Stewart, Esq., of counsel) for defendant Kalvin-Miller International, Inc. and Ohrenstein and Brown (Michael Brown, Esq., of counsel) for defendant Kerwick & Curran, Inc.; and upon the Order to Show Cause and Temporary Restraining Order, entered May 9, 1989, the Affidavit of Michael J. Sherman, sworn to May 9 , 1989 (with the exhibits annexed thereto), the Reply Affidavit of Michael J. Sherman, sworn to May 17, 1989, the Complaint in the Adversary Proceeding, Debtor's Memorandum of Law and Debtor's Reply Memorandum of Law, all in support of the Debtor's motion, and the Memorandum of Law of defendant The Insurance Company of the State of Pennsylvania, in opposition to the Debtor's motion; and

It appearing to this Court that defendants are about to commit the acts hereinafter specified and that they will do so unless restrained by further order of this Court pending a determination of the Adversary Proceeding, and that immediate and irreparable injury, loss or damage will result to the Debtor and its creditors in that the prosecution of the State Court Action and any attempt to void the Debtor's insurance policy will violate the Plan of Reorganization and make it impossible for the Debtor

to pay its creditors in accordance with its Plan of Reorganization, confirmed by this Court on April 4, 1989, and that it is appropriate to deny the request of ICSP for a stay of this Court's decision pending any appeal to the District and that the State Court Action violates the Order of Confirmation, it is

ORDERED, that defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with them be and they hereby are enjoined pending a determination in the Adversary Proceeding from proceeding with the State Court Action and from terminating the Debtor's insurance policy (copies of which are annexed as Exhibit A to the Complaint in the Adversary Proceeding and as Exhibit C to the affidavit of Michael J. Sherman, sworn to May 9, 1989) – including the provision of full coverage for the manufacturing operations and locations of the Debtor and its affiliate; and it is further

ORDERED, that pursuant to Rule 7030 of the Bankruptcy Rules, all parties shall take the depositions upon oral examination of the defendants, at the offices of the Debtor's attorneys, (pursuant to the deposition notice annexed as Exhibit I to the Affidavit of Michael J. Sherman, sworn to May 9, 1989) as follows:

1. May 31, 1989 at 10:00 a.m.: The Insurance Company of the State of Pennsylvania;

2. June 2, 1989 at 10:00 a.m.: Kalvin-Miller International, Inc. by Mark Derrenberger; and

3. June 7, 1989 at 10:00 a.m.: Kerwick & Curran, Inc. by Lester Edelman; and it is further

ORDERED, that the deposition of Ben Cooper, Inc. shall be taken by the defendants on June 8, 1989, and it is further

ORDERED, that on or before May 26, 1989, Debtor and defendants shall attempt, with all due diligence, to produce all documents requested pursuant to the document demands served by all parties.

Issued at 12:40 p.m., May 24, 1989.

/s/Cornelius Blackshear

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos.:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Assigned to
Hon. Cornelius
Blackshear

NOTICE OF
SETTLEMENT

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of an Order for Preliminary Injunction which shall be submitted for settlement before the Hon. Cornelius Blackshear, United States Bankruptcy Judge, at the United States Bankruptcy Court, Room 610—20, United States Custom House, 1 Bowling Green, New York, New York, on May 22, 1989.

Dated: New York, New York
May 22, 1989

Yours, etc.,

JACKSON & NASH

By: /s/Victoria A. Stewart
Victoria A. Stewart
Attorney for Kalvin-Miller
International, Inc.
330 Madison Avenue
New York, New York 10017
(212) 370-8100

TO: MOUND, COTTON & WOLLAN
Attorneys for Insurance Company
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& ZIEGLER, P.C.
250 Park Avenue
New York, New York 10177

OHRENSTEIN & BROWN
Attorneys for Kerwick & Curran, Inc.
655 Third Avenue
New York, New York 10017

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos.:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Assigned to
Hon. Cornelius
Blackshear

Adv. Pro.
89-5685A

ORDER

Upon the Counterorder for Preliminary Injunction entered by this Court on May 24, 1989 (the "Order"); and the affidavits and memoranda and arguments referred to in the Order, it is

ORDERED, that, by the Order Confirming Amended Consolidated Plan of Reorganization dated April 4, 1989, this Court expressly retained jurisdiction over the claims set forth in the Adversary Proceeding, and it is further

ORDERED, that the Adversary Proceeding is a core proceeding as defined under 28 U.S.C. §157(b)(2) and it is further

ORDERED, that the Order is modified to the extent that, pursuant to Rule 7030 of the Bankruptcy Rules, all parties shall take the depositions upon oral examination of the defendants, at the offices of the Debtor's attorneys, pursuant to the deposition notice (the "Debtor's Notice") annexed as Exhibit I to the affidavit of Michael J. Sherman, sworn to May 9, 1989, as follows:

1. June 28, 1989 at 10:00 a.m.: the Insurance Company of the State of Pennsylvania;

2. July 10, 1989 at 10:00 a.m.: Kalvin-Miller International, Inc., by Mark Derrenberger; and

3. July 13, 1989 at 10:00 a.m.: Kerwick & Curran, Inc. by Lester Edelman; and it is further

4. July 18, 1989 at 10:00 a.m.: The debtor by Michael Sherman

ORDERED, that the Order is modified to the extent that the deposition of Ben Cooper, Inc. shall be taken by the defendants on June 26, 1989, and it is further

ORDERED, that the Order is modified to the extent that on or before June 20, 1989, Debtor and defendants shall attempt, with all due diligence, to produce all documents requested pursuant to the document demands served by all parties except as to demand 2 of the Debtors' Notice pursuant to which defendants shall, with all due diligence, identify the writings referred to therein and shall produce those documents obtained.

Issued at 11:35 a.m., June 15, 1989.

/s/Cornelius Blackshear

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos.:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

Assigned to
Hon. Cornelius
Blackshear

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

AFFIDAVIT IN SUPPORT OF DEBTOR'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Michael J. Sherman, being duly sworn, deposes and says:

1. I am the chief executive officer of Ben Cooper, Inc. (the "Debtor"), having initially been appointed to that position by this Court. I make this affidavit on behalf of the Debtor seeking this Court's intervention to prevent The Insurance Company of the State of Pennsylvania (the Insurance Company) from taking certain actions which threaten the consummation of the

confirmed Plan of Reorganization (providing for 100% payment to all creditors) which was so carefully nurtured in these proceedings.

2. Specifically, I respectfully request this Court to enter a temporary restraining order and, thereafter, a preliminary injunction — pending a determination of the adversary proceeding to be commenced herein:

a. directing the Insurance Company to provide coverage to the Debtor (including coverage for its manufacturing facilities) in accordance with the insurance policy hereinafter described;

b. staying the prosecution of the action (the "State Court Action") commenced by the Insurance Company against the Debtor on April 18, 1989 in the Supreme Court of the State of New York, County of New York;

c. retaining jurisdiction over the adversary proceeding and determining expeditiously the dispute/claim which arose between the Debtor and the Insurance Company (and the other defendants) prior to the entry of the Order of Confirmation on April 4, 1989;

d. directing expedited discovery of the Insurance Company and the other defendants in the adversary proceeding; and

e. determining that the actions of the Insurance Company threaten the consummation of the Plan of Reorganization and violate the Order of Confirmation.

BACKGROUND

3. Immediately upon my installation as chief executive officer of the Debtor, I set about to review the Debtor's insurance

coverage then in effect. To accomplish this analysis, I turned to Lester Edelman ("Edelman") of Kerwick & Curran, Inc., Hauppauge, New York. I clearly recall explaining to Edelman in or about April, 1988 that the Debtor was the "largest manufacturer" of halloween costumes and paraphernalia in the United States. After discussing this undertaking, Edelman referred me to Mark Derrenberger ("Derrenberger") of Kalvin-Miller International, Inc. ("Kalvin-Miller"), of New York, New York.

4. Derrenberger and Kalvin-Miller immediately set about to fully review the Debtor's insurance coverage and insurance needs. In or about July 1988 – at the recommendation of Kerwick & Curran, Inc., I appointed Kalvin-Miller "broker of record" on all of the Debtor's insurance policies. It is indisputable that Kalvin-Miller was fully apprised of the Debtor's manufacturing operations conducted in Rossville, Georgia[1] (the "Rossville Plant"). In fact, Kalvin-Miller became "broker of record" on the Debtor's workers compensation and employer liability policies covering the sewing machine (and related equipment) operators at the Rossville Plant.

5. At the time of Kalvin-Miller's appointment as "broker of record", the Debtor had full insurance coverage including coverage for its manufacturing facilities at the Rossville Plant. Kalvin-Miller, working in concert with Kerwick Curran, determined that Debtor could obtain even better protection through a different insurance company. Thus, by letter dated September 21, 1988, Kalvin-Miller provided the Debtor with a written proposal for its new "insurance program." A copy of this written proposal (including the attached "Insurance Specifications for Ben Cooper, Inc. D.I.P.") is annexed hereto as Exhibit A.

6. Upon my initial review of Exhibit A, I noticed that although the Debtor's business was properly described as including "mfg" (manufacturing) on the proposed application for Corporate Kidnap and Ransom/Extortion insurance-reference to the Debtor's manufacturing operations was omitted from the description of

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[1] The Rossville Plant is leased to Galiday, Inc. – a non-operating affiliate of the Debtor. Galiday was named as an insured in the binder policy. However, all losses sustained herein were sustained by the Debtor itself.

its operations contained on the first page of the specifications. To correct this omission, I immediately telephoned Derrenberger and confirmed that the Debtor's manufacturing operations should be referred. Derrenberger acknowledged the omission and further acknowledged that he was making the necessary revision to the specifications attached to the insurance proposal.

7. On September 28, 1988, the Debtor provided Kalvin-Miller with its check in the sum of $39,570 as and for the amount necessary to bind the new insurance policies to be issued by the Insurance Company. By check dated November 4, 1988 in the sum of $80,400,[2] the Debtor paid the balance of the insurance premiums due the Insurance Company. Annexed hereto as Exhibit B are copies of the foregoing two checks for insurance premiums.

8. On October 4, 1988 — consistent with the insurance proposal (Exhibit A) — the Insurance Company issued its binder policy (the "Policy") to the Debtor. The Policy indicated that it had been "bound" by Edelman of Kerwick & Curran. The Policy incorporated the insurance specifications of the Debtor — which were revised to reflect its "mfg" (manufacturing) operations. A copy of the Policy is annexed hereto as Exhibit C.

9. Upon issuance of the Policy, the Debtor was fully insured consistent with its business requirements and its obligations to this Court and its creditors. Included in the coverage was full protection against fire loss, *inter alia*, at the Rossville Plant.

10. As confirmed by the Policy, this insurance protection was provided to the Debtor (and its affiliate) by the Insurance Company with an effective date of October 1, 1988 and an expiration date of October 1, 1989. As stated above, the annual premium of $57,000 for the Policy was fully paid by the Debtor (the additional payments to Kalvin-Miller were to cover the premiums due on other policies).

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[2] The Debtor originally intended to finance this final payment but, thereafter, decided to make a cash payment.

THE FIRE LOSS

11. On January 6, 1989, there was a fire at the Rossville Plant which caused extensive damage to the Debtor's sewing machines and related equipment and facilities. Kalvin-Miller, Kerwick & Curran and the Insurance Company were immediately informed of this loss. Almost immediately on the scene of the loss where adjusters/representatives of the Debtor (Dietz International, Inc.) and adjusters/representatives of the Insurance Company (Harris Wileman Salvors and Starr Associates, Inc.). A detailed inventory of the machinery and contents were taken jointly by those representatives. At no time was there any inference that the loss was suspicious in any manner.

12. The Debtor never questioned that this fire loss — and the substantial interruption of its manufacturing operations occasioned by this loss — was covered by the Policy. The Debtor took all reasonable actions (to the best of its financial ability) to mitigate the substantial damage to its manufacturing and business operations occasioned by this loss. Despite such efforts, the Debtor has sustained losses which, to date, exceed the sum of $2,000,000 and which, upon information and belief, may approach $3,000,000.

13. The Insurance Company was made aware of the dimensions of this economic loss in January and February 1989.[3]

THE INSURANCE COMPANY DISSEMBLES

14. Rather than acknowledging its obligations to the Debtor under the Policy, the Insurance Company immediately entered into a course of conduct designed to frustrate the Debtor's rights under the Policy and its obligations to this Court and to its creditors. At the inception of that scheme, the adjuster/representative of the Insurance Company (Richard Wurzburg of Starr Associates, Inc.) indicated to Debtor's adjuster (Dietz

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[3] The information necessary to submit a formal proof of loss was compiled by the Debtor and submitted to the Insurance Company's adjusters by letter dated April 13, 1989. A copy of this formal proof of loss is annexed hereto as Exhibit D.

International, Inc.) in January 1989 that there was an issue as to whether the Policy covered the Debtor's manufacturing facilities and whether, in fact, the existence of these manufacturing facilities was properly disclosed to the Insurance Company. Thereafter, the Insurance Company submitted an extensive document request and demanded that the Debtor submit to an examination under oath. A copy of these discovery demands (in the form of a letter dated January 25, 1989 from Mound, Cotton & Wollan – the Insurance Company's attorneys) is annexed hereto as Exhibit E.

15. On March 1, 1989, I, on behalf of the Debtor, submitted to a full examination under oath and otherwise fully complied with all requests of the Insurance Company. Hundreds of pages of documents were provided by the insured and its attorneys to the attorneys for the Insurance Company (including, of course, a copy of the Policy and the insurance specifications of the Debtor). Clearly, the Debtor fully complied with its obligations under the Policy.

16. At the conclusion of my examination (at pages 95-96 of the transcript – copies of which are annexed as Exhibit F), the insured's counsel (Mr. Ginsburg) reaffirmed to the Insurance Company's counsel (Mr. Silverberg) that the Debtor urgently required a resolution of this fire loss in order to insure the confirmation of the proposed Plan of Reorganization and the consummation of such plan. At my examination, and thereafter, the Insurance Company's attorneys repeatedly inquired as to the status of the Plan of Reorganization.

THE PLAN OF REORGANIZATION

17. On April 4, 1989, this Court entered an Order of Confirmation confirming the Plan of Reorganization. A copy of the Order of Confirmation is annexed as Exhibit G. The Plan of Reorganization requires that the Debtor continue its insurance coverage in full force (Plan of Reorganization, page 17).

18. Pursuant to the Order of Confirmation, this Court has retained jurisdiction, *inter alia*:

a. for such purposes as may be necessary or useful to aid the confirmation, consummation or implementation of the Plan [paragraph 8]; and

b. to hear and determine any controversies, suits, disputes, motions and claims that may be pending at confirmation, or which may exist on behalf of the Debtor [paragraph 8(b)(iii)].

THE INSURANCE COMPANY'S SCHEME BECOMES APPARENT

19. Several days after April 4, 1989, the Insurance Company's attorneys again telephoned the insured's attorneys to inquire as to the status of the Plan of Reorganization. At that time, the Insurance Company's attorneys were advised of the entry of the Order of Confirmation and were again advised that an expeditious payment for this fire loss would be necessary in order to consummate the Plan of Reorganization.

20. The Order of Confirmation became final and non-appealable on or about April 18, 1989. *On that very same day*, the Insurance Company commenced the State Court Action against the Debtor. A copy of the summons and complaint in the State Court action is annexed hereto as Exhibit H. In the State Court Action, the Insurance Company seeks a declaratory judgment that the Policy[4] was *void from inception*, and, therefore, that the Insurance Company has no liability whatsoever to the Debtor. On April 18, 1989, The Insurance Company also forwarded a letter and notice to the Debtor terminating its insurance coverage as of June 20, 1989 — copies of which are annexed as Exhibit K.

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[4] *Subsequent to* the January 6, 1986 fire loss, the Insurance Company forwarded to the Debtor what it asserts to be the actual insurance policy. This alleged insurance policy did not confirm to the Policy (Exhibit B) and, shockingly (but not surprisingly) did not provide protection for the fire loss. It is this alleged insurance policy that is the subject of the State Court Action. It is indisputable, however, that this attempt by the Insurance Company to deliver a non-conforming insurance policy *after* the fire loss — and contrary to the terms of the Policy then in effect — should not be countenanced by this Court.

THE RELIEF REQUESTED BY THE DEBTOR

21. By June 30, 1989, the Debtor will be required to make the final payment to creditors in the sum of approximately $2,000,000.00. With this payment, the Plan of Reorganization will be fully consummated. This final payment to the creditors is intended, as disclosed to this Court, to be financed by the Debtor. This financing, in turn, was based upon the Debtor's ability to generate receivables. These receivables, in turn, would be generated by, *inter alia*, the Debtor's manufacturing operations at the Rossville Plant. Due to the business interruption at the Rossville Plant, the Debtor may be unable to generate the receivables necessary to timely fund this final payment to its creditors.

22. Moreover, the Plan of Reorganization requires the Debtor to keep its insurance coverage in place. A condition for the Debtor's financing is that the Debtor maintain insurance coverage over its assets – failing which coverage the Debtor will not be able to obtain financing for its operations and its payments to the creditors. In fact, in the State Court Action, the Insurance Company also seeks a determination that such coverage was void from the inception thereof.

23. Accordingly, the Debtor urgently seeks a temporary restraining order (and, thereafter, a preliminary injunction) which compels the Insurance Company to continue to provide coverage under the Policy (including coverage for the Debtor's (and its affiliate manufacturing facilities) pending a final determination of the adversary proceeding to be commenced simultaneously herewith. The failure to provide such injunctive relief may result in irrevocable injury to the Debtor and to its creditors.

24. In addition, the Debtor seeks an order enjoining the prosecution of the State Court Action which was commenced in violation (and in utter contempt) of the Order of Confirmation. In that regard, the Debtor requests that this Court take jurisdiction over this claim/dispute which indisputably arose prior to

the entry of the Order of Confirmation. It is clear that the Insurance Company disingenuously attempted to circumvent the Order of Confirmation by waiting until it became final and non-appealable before formally and finally rejecting the Debtor's fire loss claim.

25. Because of the shortage of time before the next payment to creditors is due, the Debtor also seek an order permitting expedited discovery of the Insurance Company, and the other defendants, pursuant to the deposition notices which are annexed hereto collectively as Exhibit I.

26. Finally, there is (and can be) no prejudice to the Insurance Company (or to the other defendants) occasioned by the entry of this preliminary injunctive relief.

THE ADVERSARY PROCEEDING

27. Annexed hereto as Exhibit J is a copy of the Complaint in the adversary proceeding which the Debtor intends to commence simultaneously herewith.

28. The facts are clear: the Debtor paid $57,000 for insurance coverage; Kalvin-Miller acted as the Debtor's agent in procuring that coverage; Kerwick & Curran were "bound" that coverage on behalf of the Insurance Company; both Kalvin-Miller and Kerwick & Curran were fully apprised as to the insurance specifications of the Debtor — including the manufacturing facilities located at the Rossville Plant; insurance coverage was issued to the Debtor in the form of the Policy (Exhibit C); the Insurance Company now disingenuously disclaims liability to the Debtor and insists that it was never informed of the Debtor's manufacturing facilities.

29. From the foregoing, it is clear that either the Insurance Company is liable to the Debtor under the Policy *or* Kalvin-Miller and/or Kerwick & Curran are liable to the Debtor for their negligence and/or malpractice in failing to obtain such coverage.

30. Here the plot thickens even further: the Insurance Company is a subsidiary of the American International Group, Inc. ("AIG"). I am advised, and believe, that the insurance companies providing coverage for the negligence and/or malpractice of Kalvin-Miller and Kerwick & Curran are also subsidiaries of AIG. In sum, this "gaggle of geese" – the three subsidiaries of AIG – will ultimately dispute amongst themselves which one of them are liable to the Debtor for this fire loss. While they fight amongst themselves, however, the Debtor may be irreparably harmed. To the extent appropriate, therefore, I respectfully urge this Court to direct the defendants in the adversary proceeding (and their respective insurance carriers) to acknowledge their liability to the Debtor and to set about, in good faith, to determine the extent of the fire loss for which they (or certainly at least one of them) are indisputably liable.

WHEREFORE, on behalf of the Debtor, I ask this Court to enter the temporary restraining order (and, thereafter, grant the preliminary injunction) and to otherwise take such equitable action on behalf of the Debtor which may be appropriate in the circumstances.

/s/ Michael J. Sherman
Michael J. Sherman

Sworn to before me
this 8 day of May, 1989.

/s/ Lawrence Ginsburg
Notary Public

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos.:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

- against -

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Assigned to
Hon. Cornelius
Blackshear

REPLY AFFIDAVIT IN SUPPORT OF DEBTOR'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL J. SHERMAN, being duly sworn, deposes and says:

1. I make this affidavit in further support of the motion of Ben Cooper, Inc. ("Debtor") for a temporary restraining order and preliminary injunction and in reply to the Memorandum of Law submitted by defendant The Insurance Company of the State of Pennsylvania (the "Insurance Company") submitted in opposition to our motion. Submitted simultaneously herewith is a Reply Memorandum of Law which addresses, and refutes, the positions of law asserted by the Insurance Company. The purpose of this affidavit is to clarify and highlight the Insurance Company's misstatements (and omissions) of fact.

Kerwick & Curran, Inc. is
the Insurance Company's Agent.

2. Shockingly omitted from the Insurance Company's Memorandum of Law is any reference to the fact that the binder insurance policy (the "Policy" – a copy of which is annexed as Exhibit C to my affidavit sworn to May 8, 1989) indicates that the Policy is "bound by" Kerwick & Curran, Inc. The Insurance Company's protest notwithstanding, Kerwick & Curran clearly acted on behalf of the Insurance Company in binding the Policy – no contrary conclusion can be reached in the circumstances. In the absence of discovery, the Debtor is not able to state conclusively the exact nature of the agency and/or contractual relationship between the Insurance Company and Kerwick & Curran. One thing, however, is abundantly clear: Kerwick & Curran had at least apparent authority to bind the Insurance Company and, in the Policy, exercised that apparent authority as its agent. The Insurance Company asks this Court to accept a definition of the Policy as a meaningless piece of paper entered into by the two agents of the Debtor. On the contrary – and as set forth in the Reply Memorandum of Law – this [binder] Policy is a contract for insurance coverage enforceable against the Insurance Company.

3. The Insurance Company asserts, in effect, that the Policy relied upon by the Debtor is a nullity. In its place, the Insurance Company relies upon a policy (the "Rejected Policy") which is annexed as Exhibit 1 to the Insurance Company's Memorandum of Law. The Insurance Company alleges that I "identified"

the Rejected Policy at my examination under oath. As previously set forth, the Debtor did not receive the Rejected Policy until after the fire loss on January 6, 1989. Nor, I am advised and believe, did the Debtor's insurance agent, Kalvin-Miller International, Inc., receive the Rejected Policy until after the fire loss. Moreover, as reflected in Exhibit 3 to the Insurance Company's Memorandum of Law, it appears that Kerwick & Curran was the Insurance Company's "broker" on this matter and that the Rejected Policy was forwarded, on November 28, 1988, to Kerwick & Curran.[1]

4. Immediately upon receipt of the Rejected Policy, the Debtor rejected the Policy and returned it. Accordingly, it is hardly fair to state that I "identified" the Rejected Policy at my examination under oath. Rather, I confirmed that I was "not familiar with it" (Insurance Company Memorandum of Law, Exhibit 2, page 20); and the insured's attorney clearly indicated that insurance coverage was provided by the Policy and not by the Rejected Policy (Insurance Company Memorandum of Law, Exhibit 2, page 26).

5. By documentary evidence, the Debtor has demonstrated a likelihood of success of proving that Kerwick & Curran was the agent of the Insurance Company in this matter.

This Court Has Properly Retained Jurisdiction Over This Claim.

6. Again, shockingly omitted from the Insurance Company's Memorandum of Law is the fact that this Court has expressly retained jurisdiction over this dispute/claim which arose prior to the entry of the Order of Confirmation. In addition to that express retention of jurisdiction, this Court has inherent jurisdiction over this "core" proceeding. In its Reply Memorandum of Law, the Debtor refutes the disingenuous position of the Insurance Company to the effect that jurisdiction does not properly

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[1] A review of Exhibit 3 reflects that Kerwick & Curran ("K&C") were the Insurance Company's broker on four separate engagements referred to on this one page — covering a one week period.

lie in this Court. In refuting the Insurance Company's arguments, we note that a fundamental premises of the Insurance Company's argument – namely, that a jury trial is required – is without basis in law.

The Attack On The Plan Of Reorganization Is Unfounded.

7. In a disingenuous attempt to avoid the clear language of retention set forth in the Order of Confirmation, the Insurance Company alleges that the debtor somehow wrongfully withheld from its creditors the fact that the Insurance Company would seek to void the Policy from its inception. This contention is baseless.

8. As this Court is well aware, the Plan of Reorganization envisions a 100% payment to creditors. In order to consummate the Plan of Reorganization, the Debtor disclosed that it would require substantial financing. Consummation was not dependent on the resolution of this fire loss claim.

9. Although this claim/dispute with the Insurance Company had arisen prior to the entry of the Order of Confirmation, the debtor believed that the Insurance Company was acting in good faith until the Insurance Company's lack of good faith was disclosed on April 18, 1989 – the date upon which the state court action was commenced and the Insurance Company sought to void the Policy from its inception. Thus, at the time of the Order of Confirmation, the Debtor believed that its insurance coverage was fully in place and that the amount of the insurance claim would be resolved expeditiously.

10. The Insurance Company's argument in this regard is, essentially, that the Debtor should have known at confirmation that the Insurance Company would *thereafter* seek to void the Policy from its inception. I respectfully suggest that this position is untenable. In sum, by the Plan of Reorganization, the Debtor provided its creditors with all information necessary to exercise their business judgment – and at the time of confirmation, the Debtor could not have known of the prospective scheme of the Insurance Company.

The Debtor will Suffer Irreparable Injury If The Policy Is Terminated Prior To A Determination Of The Adversary Proceeding.

11. The Insurance Company argues that it has a right to terminate the insurance coverage of the Debtor pursuant to the terms of the Rejected Policy. The Debtor believes that this position is unreasonable. First, the Debtor believes that its coverage (for which it fully paid the Insurance Company) is afforded under the Policy and not under the Rejected Policy. That coverage was for a one year period – until October 1, 1989. The Debtor is entitled to such coverage. In the circumstances, the Insurance Company should not be permitted to rely upon the Rejected Policy which, by its very nature, is suspect (and which, in material respect, is inconsistent with the Policy).

12. Moreover, by commencing the state court action and alleging that the Debtor committed serious acts of fraud against the Insurance Company, the Insurance Company has rendered it extremely difficult for the Debtor to obtain replacement coverage. Despite its diligent efforts, the Debtor has not been able, to date, to obtain replacement coverage – and the Debtor rejects the suggestion that it is obligated to do so.

13. I again respectfully urge this Court to insure, *pendente lite*, that the insurance coverage afforded to the Debtor pursuant to the Policy (including coverage for the manufacturing facilities of the Debtor) remains in place.

WHEREFORE, I respectfully request that the Debtor's motion for a temporary restraining order and preliminary injunction be granted in all respects.

/s/
Michael J. Sherman

Sworn to before me this 17 day of May, 1989

/s/ Lawrence Ginsburg
Notary Public
LAWRENCE L. GINSBURG
Notary of the State of New York
No.
Qualified in Westchester County
Commission Expires March 30, 1990

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos.:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Assigned to
Hon. Cornelius
Blackshear

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon reading and filing the affidavit of Michael J. Sherman, sworn to on May 8, 1989, together with the exhibits annexed thereto, including the complaint in the Debtor's adversary proceeding and the notice of deposition, it is

ORDERED, that the defendants show cause before this Court, at the United States Custom House, 1 Bowling Green, New York,

New York, on May 17, 1989 at 2:00 p.m., or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue herein enjoining the defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with them, pending the final hearing and determination of the adversary proceeding: (i) from prosecuting the action commenced on or about April 18, 1989 in the Supreme Court of the State of New York, County of New York, entitled *The Insurance Company of the State of Pennsylvania* v. *Ben Cooper, Inc.* (the "State Court Action"); (ii) from terminating the Debtor's insurance policy issued effective October 1, 1988 with defendant The Insurance Company of the State of Pennsylvania (a copy of which is annexed as Exhibit A to the complaint in the adversary proceeding and as Exhibit C to the affidavit of Michael J. Sherman) – including the provision of coverage for the manufacturing facilities of the Debtor and its affiliates; and

It appearing to the Court that defendants are about to commit the acts hereinafter specified and that they will do so unless restrained by order of this Court, and that immediate and irreparable injury, loss or damage will result to the Debtor in that the prosecution of the State Court Action and any attempt to void the Debtor's insurance policy will violate the Plan of Reorganization and make it impossible for the Debtor to pay its creditors in accordance its Plan of Reorganization, confirmed by this Court April 4, 1989, and that the State Court Action violates the Order of Confirmation; and telephonic and written notice having been given to the defendants on May 8, 1989 as appears from the affidavit of Lawrence L. Ginsburg, Esq., sworn to May 8, 1989; it is further

ORDERED, that defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with them be and they hereby are restrained from proceeding with the State Court Action and from terminating the Debtor's insurance policy (a copy of which is annexed as Exhibit A to the complaint in the adversary proceeding and as Exhibit C in the affidavit of Michael J. Sherman) – including the provision of full coverage for the manufacturing operations

and locations of the Debtor and its affiliate pending the hearing and determination of this motion; and it is further

ORDERED, that pursuant to Rule 7030 of the Bankruptcy Rules, plaintiff shall take the depositions upon oral examination of defendants The Insurance Company of the State of Pennsylvania, Kalvin-Miller International, Inc. and Kerwick & Curran, Inc. not later than 10 days from the date of issuance of this Order in accordance with the deposition notice annexed to the affidavit of Michael J. Sherman and defendants shall fully comply therewith; and it is further

ORDERED, that this Order shall expire within ten days after entry unless within such time the Order is for good cause shown extended for a like period, or unless the defendants consent that it may be extended for a longer period; and it is further

ORDERED, that service of this Order to Show Cause together with a copy of the papers hereto attached on defendant The Insurance Company of the State of Pennsylvania by service upon Mound, Cotton & Wollan and upon defendants Kalvin-Miller International, Inc. and Kerwick & Curran, Inc. on or before May 10, 1989, at 5 p.m., be deemed sufficient service.

Issued at 3:35 p.m., May 9, 1989.

/s/C.B.

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

In the Matter of — Case No.

BEN COOPER, INC., — 88 B 10484

Debtor.

----------x

May 17, 1989
United States Custom House
One Bowling Green
New York, New York 10004

OSC with TRO re: Staying prosecution of State Court proceeding terminating Debtor's insurance policy, etc.

BEFORE:

HON. CORNELIUS BLACKSHEAR,

Bankruptcy Judge.

APPEARANCES:

LOWENTHAL, LANDAU, FISCHER & ZIEGLER, P.C.
Attorneys for Debtor
250 Park Avenue
New York, New York 10177

BY: LAWRENCE L. GINSBURG, ESQ., of Counsel

MOUND, COTTON & WOLLAN, ESQS.
Attorneys for Insurance Company of
The State of Pennsylvania
125 Maiden Lane
New York, New York 10038

BY: COSTANTINO P. SURIANO, ESQ., of Counsel

OHRENSTEIN & BROWN, ESQS.
Attorneys for Kerwick & Curran
655 Third Avenue
New York, New York 10017

BY: MICHAEL D. BROWN, ESQ., of Counsel

JACKSON & NASH, ESQS.
Attorneys for Calvin Miller
International
330 Madison Avenue
New York, New York 10017

BY: VICTORIA STEWART, ESQ., of Counsel

PROCEEDINGS

MR. GINSBURG: When we were last before Your Honor on May 9th the Court entered a Temporary Restraining Order restraining the insurance company from terminating the Debtor's insurance coverage and enjoining the insurance company from prosecuting the State Court action and directing expedited discovery.

I would like to hand up Affidavits of Service of the Order to Show Cause and supporting Memorandum of Law, together with the originals of the Debtor's Reply Affidavit and reply Memorandum of Law, courtesy copies of which were delivered to the Court this afternoon (handing).

THE COURT: Those are originals?

MR. GINSBURG: Yes.

THE COURT: They need to be filed with the Clerk's Office. I have copies?

MR. GINSBURG: Yes. I believe the papers now submitted to the Court by the insurance company and by the Debtor clearly support the Debtor's position, clearly mandate the imposition of a preliminary injunction pending a determination of the adversary proceeding.

The Order of confirmation retains jurisdiction over this dispute. This dispute affects the administration of the Debtor and the consummation of a plan and beyond the express retention of jurisdictions that constitutes the Court proceeding.

At the very least, it may not be a serious dispute, that this is a related proceeding, and the Court should take jurisdiction.

I would highlight these points made in the memorandum.

A lot is made in the insurance company's papers to the effect that this court cannot entertain this trial. The basis for that claim is the following.

The insurance company ignores the terms of the Order of Confirmation. It ignores the express retention of this dispute by the Court.

The Debtor next says and concludes this is a core proceeding; it is not a core proceeding.

The insurance company next goes on to say it's a related proceeding. It may not be, but even if it is, they are entitled to a jury trial, and the recent case law in that area would preclude this Court from having a jury trial.

That is wrong. First of all, it's wrong because –

THE COURT: Counsel, you don't have to belabor the point. Most parties seem to use core and noncore to discuss jurisdiction, and that is not the case.

The cases that this Court has jurisdiction to hear is any matter that is related to a bankruptcy case, whether it's core or noncore.

This Court, the only difference that it makes is it's a matter how it will get up to District Court, whether it be by final Order by this Court, which it recently did in a case where it decided it was a noncore matter, that it will submit to the District Court findings of facts and conclusions of law.

As far as a jury trial, this Court can conduct a jury trial.

However, that is a motion that has to be made and I will make a determination as to whether the parties have a right to a jury trial.

If the parties feel this Court does not have the proper jurisdiction, then they can always make their request to the District Court to revoke the reference.

But as far as the jurisdiction of this Court, is that core and noncore has nothing to do with jurisdiction.

Is there anything else that the parties may wish to —

MR. GINSBURG: May I simply move on to the bottom line, here, which is the Debtor paid for insurance coverages, the Debtor received a binder.

It is called a binder, it smells like a binder, we manufactured facilities pursuant to the binder, and now the insurance company says that is a goose.

We don't know who this Kerwick & Curran are, they are not our agents. I guess the insurance company is saying that our two agents got together and bound each other.

We don't think that is a legitimate position, Your Honor.

I would add, Your Honor, that we have now been told that two of the three parties here are insured by subsidiaries of the American International Group, which was our belief.

Counsel to Calvin Miller has refused my request to disclose whether or not Calvin Miller is so insured.

We would ask the Court to perhaps make that inquiry, because we're back to the situation where the Debtor is out there fighting three hits, and we don't think that is right.

We ask that this thing move along on an accelerated basis to a resolution.

THE COURT: Very well.

MR. BROWN: My name is Michael Brown. We don't represent the insurance company, we represent Kerwick & Curran.

I am not really sure why it is Kerwick & Curran are here. They are a wholesale broker. They did place coverage with the State of Pennsylvania.

As far as they know, it's a perfectly valid policy. We got served with a Summons and Complaint. I don't really believe this is a judicial controversy.

THE COURT: Except that the insurance company is supposed to be bound by your actions, and they are saying they are not bound, and what we need is that we need all the parties here before us to make a determination as to what, if any, coverage the Debtor has.

MR. BROWN: I have not seen what the insurance company has said. I think there may be misnomers going along here.

The way the insurance industry works, our client is a wholesale broker. It is, in fact, the agent of the retail broker, in this case Calvin Miller, who in turn is the agent of the insured, in this case the Debtor, who sought to place insurance.

My understanding, although I have not had time to meet and prepare my client, I have just been retained, is, in fact, they did place coverage with the State of Pennsylvania Insurance Company, and that authorized underwriter with the power to bind the insurance company, State of Pennsylvania, did bind this coverage.

We're not the agent of the State of Pennsylvania, we have never held ourselves out to be, but we did place coverage on behalf of the Debtor with the insurance company, the State of Pennsylvania.

I would be surprised if the officials of the State of Pennsylvania would dispute that.

THE COURT: I think that is why we're here.

MR. BROWN: The reason I am standing up right now is that we've gotten a half set of papers which mentions something about a deposition tomorrow, and we have not had time to —

THE COURT: That we can — I am quite sure the Debtor would be more than reasonable in working out something that is mutually convenient for all the parties as far as the deposition is concerned.

MR. BROWN: We do want to reserve our right, if there's a judicial controversy, for a jury trial, and we move our right to set aside the reference here to this Court; we believe it's a State Court matter, to the extent it exists at all.

THE COURT: Very well.

MR. SURIANO: I represent the insurance company, the State of Pennsylvania.

Your Honor, we also submitted papers to you, and if I may, I would like to summarize our position.

We think that the Debtor's papers are bringing all of the substantive issues before this Court.

THE COURT: The reason they are doing that, they are asking for equitable relief, they are asking for an injunction.

Any time that you ask for an injunction you must show that you have at least a colorable case that you possibly could win in order for me to grant them that relief.

They are not at this time attempting to try their case as they are trying to convince this Court that I should issue a preliminary injunction in place of the TRO.

MR. SURIANO: I believe that is what they are trying to do, Your Honor, but I would persuade you not to do what they are asking you to do for a number of reasons.

First, we think that this case, if it belongs at all in the Federal system, must be heard by the District Court.

THE COURT: Why?

MR. SURIANO: As Your Honor alluded to earlier, we don't believe that this Court —

THE COURT: Don't use the word "jurisdiction."

MR. SURIANO: Well, that is my position, Judge. I understand you disagree with it, and that is —

THE COURT: Not only do I disagree, but you will find that all the Federal Courts disagree with it.

MR. GINSBURG: In Pied Piper, the issue in Pied Piper, Southern District of New York, it was not so much a question of jurisdiction, but a question of whether or not, because it happened to be the Insurance Company of Pennsylvania that was a Defendant in that case, too, because that company and my client's company was entitled to a jury trial, Judge Sweet withdrew that case from Judge Buschman and brought it —

THE COURT: That is not jurisdiction.

MR. SURIANO: I understand that.

THE COURT: You have the absolute right to see if one of the District Court Judges is willing to withdraw the reference.

Until someone does that, I am going to move along with this case in an expedited manner, because we have the issues here that can make or break confirmation, and I intend to see that it moves quickly.

Continue.

MR. SURIANO: We didn't feel it appropriate, Your Honor, in view of the TRO, to make a motion to the District Court without at least coming before you to argue our position.

THE COURT: You have my absolute blessings to go up to the District Court and ask them that the reference be withdrawn.

MR. SURIANO: In conjunction –

THE COURT: Good luck.

MR. SURIANO: Let me tell you why, Judge. It is because of the Pied Piper case that we feel we're correct.

THE COURT: I have not had the opportunity to read the Pied Piper case.

MR. SURIANO: We attached it –

THE COURT: Fill me in with the facts.

MR. SURIANO: There was a coverage dispute that excepted a – between an insured and my client before the insured went into bankruptcy.

The nature of the coverage dispute went to whether or not there was coverage and the extent of the damage, if any, was a burglary loss.

In that case, after the bankruptcy filing, of course, there was a lawsuit brought by the Trustee in the bankruptcy context, and my client asserted affirmative defenses, one of which was this case that my client requested a jury trial.

Judge Buschman in his opinion denied that, and said that there was also an issue of core and noncore, and there's a scholarly opinion by Judge Sweet in which he said, and I quoted in my papers, Judge Sweet concluded that the Seventh Amendment right to a jury trial which my client had in that case, and we think has in this case, precluded the Bankruptcy Court Judge from hearing, because as you alluded to earlier, the question is whether or not it's going to be a de novo trial or a final Order, and Judge Sweet said that in that case the District Court ought to hear it.

It took awhile for the whole process to wind its way up. My opponent cited only Judge Buschman's opinion and that was an oversight and – I don't think he disputes the veracity of that opinion.

We think we're even in a stronger position than my client was in that back then, and the reason, this is a Debtor in Possession. A Debtor in Possession stands in the shoes of a Trustee.

THE COURT: Just opposite, the Trustee stands in the shoes of the Debtor in Possession.

MR. SURIANO: They have the same –

THE COURT: Almost the same.

MR. SURIANO: And if that is the case –

THE COURT: Was that a Trustee in a liquidating case or a reorganization case?

MR. SURIANO: I think reorganization, Your Honor.

Our point is that the Debtor in Possession who applied for insurance through – and now we have on the record the clear statement that at least one – we have not heard from one of the counsel, but I think she'll take the same position – that neither of the insurance brokers in this case are the agent of the insurance company, which is the position posited incorrectly by the Debtor In Possession; they are his agents.

And to respond to –

THE COURT: No, you can't jump from his statement that he is not your agent to making him now the Debtor's agent. I don't think that he indicated that on the record.

MR. SURIANO: Well, it's our position, Your Honor – I thought he had, I may have misheard – it's my client's position that the two insurance brokers are absolutely not the agent of the insurance company, but are, in fact, the agent of the Debtor in Possession.

But to return to my main point, which was because we're dealing with a Debtor in Possession, that Debtor in Possession does not have any greater rights than any other person in the world would have in a commercial dispute, whether it be with Con Edison –

THE COURT: Wait. You may be right in what you are saying, but you are not addressing the issue of whether or not a preliminary injunction should be in place, because if I don't clear the preliminary injunction, you win without even having to go through this Court.

MR. SURIANO: My main request is that you do not issue a preliminary injunction, that you lift the stay.

THE COURT: I don't have to lift the stay for you to make a request in the District Court to revoke the reference.

MR. SURIANO: As I said –

THE COURT: But I will put in the preliminary injunction to make sure that is the route that you take.

MR. SURIANO: If we have to, we will take that route.

So our position is stated for the purposes of the record, just to round out the argument, we would request that you do lift – I understand you have indicated that you will not –

THE COURT: Why do I need to lift the stay?

MR. SURIANO: You have granted a stay also as to the cancellation issue, which I was going to get to.

THE COURT: You win without having to argue your case before either this Court or the District Court if I do that.

MR. SURIANO: No, respectfully, no; if your Honor lifts that portion of the stay which went to the cancellation issue without lifting the portion that goes to the State Court action, I am still faced with a matter in the Bankruptcy Court which I wish to avoid.

THE COURT: The only thing that you can avoid – I thought I made it crystal clear, the only way to avoid this issue in the Bankruptcy Court is to get the District Court to revoke the reference, because your case should not be heard in the State Court when I have jurisdiction over the asset of the Debtor.

And if you read the term property of the estate, it is all encompassing, including choses in action.

MR. SURIANO: Your Honor made it eminently clear that is the route we have to take, and we will.

What I am asking the Court to do is to consider our position vis-a-vis that portion of the stay that goes to the cancellation notice.

Let me back up a step. The TRO which was granted had three elements. The first was to stay our State Court action in New York County.

The Court has told me already where it's going.

The second branch of the stay was as part of our belief that because of the material misrepresentations of the Debtor and/or its agents in totally, and we believe falsely describing to us the nature of its operations, and the extent of the loss which it claims it sustained, we believe we have a right to have the policy declared void ab initio.

Concommitantly we issued a notice of cancellation pursuant to the contract that the Debtor seeks to enforce and we seek to have declared void ab initio, which notice of cancellation takes effect on June 20th.

In Your Honor's Order you restrained us from effecting that cancellation, and what I am arguing to you now is, notwithstanding your decision not to lift the stay as to the State Court action, you should, at least in the interim, while we go to the District Court and have this issue resolved, lift the cancellation issue.

Why? What is the harm to them and what's the harm to us? The harm to us is that we are on a risk which we believe we should not be on because of the material omissions and misrepresentations.

Now, they obviously have a substantive disagreement with that point. They think they should be covered.

However, the contract which they seek to enforce and we seek to nullify by its very terms has a cancellation provision which allows us for the specific reasons of misrepresentation, which we asserted as the basis of part of the reason for our cancel, by the stay, the Court is creating coverage where none would exist.

THE COURT: I disagree. If you are successful in convincing this Court or any other Court that there was — that there were misrepresentations, material misrepresentations, then it is void ab initio, and if it's void ab initio, it's that you don't have the coverage, not only of the issue that is before us today, as far as the loss that was suffered, but nothing that would occur in the future.

So I don't see how that — if you are correct in your contention, I don't see how you are prejudiced by the stay staying in place as far as the cancellation.

MR. SURIANO: Life being what it is, and there is a chance, and that is what insurance is all about, that this company would sustain another loss just in this period, and we're not —

THE COURT: Even if it does, and you don't have to cover because of material misrepresentation by this Debtor, that means that you don't have to cover anything in the past or in the future.

But if you do have to cover, and they paid you your premium, that is the purpose of having insurance.

MR. SURIANO: The third branch, the third strike of our application – perhaps we can work this out – the necessity for expedited discovery.

THE COURT: The problem with that – you see, this case was confirmed on the assumption that this company had proper insurance.

If it – that is one of the reasons why I'm putting – why I decided – if you go back to State Court, we know how long that will take.

I can get this matter heard and resolved within a short period of time, as it cannot be done in the District Court.

If this case is not consummated, and that is another art term in bankruptcy, which is supposed to occur substantially within a short period of time after confirmation, that creditors can come in and ask this Court to revoke its Order of Confirmation, which means all this work we've been doing in this case since close to the beginning of 1988 is for naught.

And that is one of the reasons that they ask for expedited discovery and one of the reasons I granted it.

It seems to me that right now, from what I hear from the parties as far as the issues go, that discovery should not take an inordinate amount of time.

If you decide – if the Judge up in the District Court wished to revoke the reference, just think, you can walk up there to him with a case that all of the discovery has been completed.

MR. SURIANO: If I may, Your Honor, I respectfully disagree. I am in no way trying to impugn the hard work that this Court and the parties did in the bankruptcy. We're aware of that.

From my client's point of view, it's not part of the bankruptcy.

THE COURT: It is now.

MR. SURIANO: I am getting the message, Judge. We think that this policy was not referenced – strike that – the policy of my client is nowhere in any of the papers that I have seen referred to by the Debtor or any of its attorneys, it's not in the plan.

The only reference to insurance that I have seen, Judge, and I am not going to represent that I looked at all the papers in the limited amount of time, is what you said, the Debtor must maintain insurance.

They didn't have a claim as part of the plan that was confirmed on April 4th to this –

THE COURT: Yes, they did. That was – part of the funds to be used in confirmation in the paying off of creditors was based on the fact hopefully they were going to receive funds from the insurance company for the loss.

MR. SURIANO: I defer to the Court, I didn't see that in any paper. I request that counsel for the Debtor provide me with where they said that the $2 million policy –

THE COURT: I don't know if it was said specifically.

MR. SURIANO: They didn't submit the – they didn't submit it until after. How did they know the claim amount? I am at confusion.

The claim, as I understand it – by the way, we believe it's grossly exaggerated and that will form another basis for denial of the claim – but let's assume it is $2 million, that wasn't – I don't think it was, according to the papers in Mr. Sherman's

Affidavit, formulated by the Debtor in Possession's public adjuster, Dietz & Company, until April 13th, and then transmitted to the insurance company sometime thereafter.

I think this Court signed the Order on April 4th.

THE COURT: I don't remember when it was.

MR. SURIANO: I would ask that you allow me the opportunity on this point to do a little more research, because I don't think that the specific policy proceeds are contemplated as an asset of the Debtor to satisfy the bankruptcy plan.

THE COURT: Notwithstanding Section 541?

MR. SURIANO: I am speaking specifically. You are talking about – I am speaking about specifically, Your Honor.

I will go back to my third strike and then I will sit down, if it is a strike. I might get to first base.

We don't see the necessity of having the discovery – I understand what you are saying in terms of the speed – at least until such time as we can make – and I am willing to do it on an Order to Show Cause basis – at least get before the District Court for it to determine whether or not it wishes to withdraw this case from this Court.

And, yes, discovery should be quick in a bankruptcy matter; however, there are other issues involved.

There are the convenience of at least two of the other parties, and my client is supposed to be deposed on Friday, which what we're saying is, can you order that the discovery be held off until next week to give us a chance to go into the District Court?

THE COURT: You got to first base. Sure; in fact, I think if you had asked counsel, they would probably have agreed to that.

MR. SURIANO: I did ask counsel, and with all due respect, they said no.

Thank you.

MS. STEWART: I am with the firm of Jackson & Nash. We represent Calvin Miller International.

I wanted previously to address the third issue. We're not party to the State action, and therefore, the two claims of relief do not affect my client.

However, we've been served with a Notice of Deposition and demand to produce documents.

My firm was retained this Monday, May 15th, in this matter. On Tuesday, May 16th, I called counsel for the Debtor and asked that assuming that the Court granted expedited discovery, that we could reschedule the deposition of Mr. Derenberger until possibly the 22nd.

I explained that we had just been retained and also that Mr. Derenberger was out of town and I had no chance to speak with him.

Mr. Derenberger is due to return tomorrow. I put my request to counsel for the Debtor and, of course, I was also not given the extension.

Your Honor is so sure that counsel for the Debtor is so reasonable, I would like a guarantee of that.

THE COURT: If I ordered it, then he will be reasonable.

MS. STEWART: I would request, however, a possible two-week extension, if possible.

We've been served with a demand to produce documents. That is rather vague and extensive, and in order to prepare my client and be familiar with the case, I think we need at least two weeks.

MR. GINSBURG: May I be heard?

THE COURT: Address the issues as to the funds to be used for confirmation.

MR. GINSBURG: I was not counsel to the Debtor in Possession on confirmation. Neither at consummation or in our papers do we say that these funds, specific insurance proceeds, are to be used to fund consummation.

What we say and what the Debtor testified to at confirmation, is that in order to consummate they will have to finance; in order to finance they have to have insurance.

Because of the business interruption, they have not been able to generate the receivables necessary to finance and they have a risk of not having insurance.

The Debtor as we speak today doesn't know, and would testify if called upon, whether it will be able to consummate.

Clearly these issues are so inextricably bound and I am told by Mr. Sherman in discussions with creditors, creditors representing ninety-five percent of the debt here were fully advised by the Creditors Committee of the fire loss.

If I may respond, I realize I might appear to be unreasonable, but I will take a chance.

Two things. Number one, Mr. Suriano said that the insurance policy that we seek to enforce and they seek to void gives them the right to terminate.

That is not true. The insurance policy that they seek to void is not the insurance policy that we paid money and got.

It wasn't received by the Debtor until after the fire, it doesn't conform to the binder that we paid for, that was bound.

The binder doesn't provide for any right to terminate, and we argue seriously that it's that binder policy covered by Kerwick & Curran that we're entitled to collect under.

As far as deposition, accelerated discovery is quite appropriate and important here.

THE COURT: I agree, but let's not rush to judgment here.

One thing this Court does not encourage is it does not encourage depositions in such a manner that the parties will then have to do it again, because the other parties have not had the opportunity to provide all of the information that is required in order to do an intelligent deposition.

If you have asked for documents and those documents need to be produced and you need to review them, they would need to have them provided to you, and then after the deposition find that there were other questions that you needed to ask.

When I say expedited, usually the Court looks at expedited as something less than thirty days, but not tomorrow.

MR. GINSBURG: With all due respect, Your Honor, if Mr. Suriano had told me that he was going to go move imminently in the District Court and seek a TRO, I might have accommodated him.

THE COURT: I don't think –

MR. GINSBURG: I don't think there's a basis for accommodating him, if I might make my pitch.

The argument here that Pied Piper mandates this Court or mandates the District Court to pull this case away is wrong.

The Pied Piper case is distinguishable. In Pied Piper there was no express retention of jurisdiction by an Order of Confirmation.

In Pied Piper most significantly there was a money damage claim at law, and the whole inquiry was if you have a Seventh Amendment right to a jury trial, maybe you shouldn't have a jury trial if it's a waste of judicial economy.

THE COURT: I know that we can –

MR. GINSBURG: In the New York Court of Appeals you can't argue – this is an argument to rescind an insurance contract, it's an argument of equity; there is no right to a jury trial.

On that basis I don't think discovery should be put off.

THE COURT: I am not putting it off, I am just basically extending it to sometime out in the future that is reasonable, so the parties – I will set the schedules, because it appears that is something that I am going to have to do anyway.

Hopefully, the parties, even if the District Court decides to withdraw the reference, at least you will have it ready to go to trial when you get there.

What is a reasonable date for your clients to be available for a deposition, Mr. Suriano?

MR. SURIANO: Bearing in mind that I would like to make the motion that I indicated that I would, I would agree with co-counsel's suggestion that we put everything off for two weeks.

THE COURT: No, we don't put things off for two weeks. When will your clients be available for deposition and when can you provide the documentation requested by counsel for the Debtor?

MR. SURIANO: I don't have a calendar before me, but within that two weeks, let's pick a day and I will do it.

THE COURT: Fine, but I want to make sure that it's a date that you will be available and that your client will be available, and prior to that date you will have provided the Debtor with all the documentation that they require.

MR. SURIANO: The 31st, Wednesday.

THE COURT: Fine. Counsel?

MS. STEWART: I can have my client available Friday, June 2nd.

THE COURT: Very well.

MR. BROWN: Can I have June 7th, I have some engagements?

THE COURT: Certainly.

MR. BROWN: Your Honor, we will be prepared to serve document demand by the end of this week. I assume they will be honored prior to the deposition.

THE COURT: It doesn't make sense to have the deposition without the documents.

MR. BROWN: Can I just ask, because this is being expedited, Mr. Suriano made some references to misrepresentations that were made to the State of Pennsylvania, and he said something about the extent of damages.

He also said the nature of the operations. Can I ask him to tell us exactly what it is that his client believes was not told to him?

THE COURT: No, that is to wait until the actual trial.

First of all, he may have a problem with attorney-client privilege, he is not under oath, and the best he could tell us is upon information and belief, which doesn't do us any good at all anyway.

MR. BROWN: He brought an action saying that there were material omissions.

THE COURT: That is where it's going to be very interesting, at the depositions, that I am sure you all want to attend each others' depositions.

I think at that point it will be gone through at great length.

MR. BROWN: I am sure it will.

MR. GINSBURG: One last time, might I ask that we agree before the Court that the documents will be produced perhaps two days before each deposition?

THE COURT: We need it more than two days. Since I am allowing this – I have been so generous – documents should be provided no later than May 26th.

MR. SURIANO: I have no problem with the date, but the nature of the document request –

THE COURT: It's too broad?

MR. SURIANO: Yes.

MS. STEWART: It's very broad.

THE COURT: Can you narrow it down?

MR. GINSBURG: I don't believe it's broad.

MR. SURIANO: It asks my clients as well as theirs that every policy in the United States be produced in which my client insured a manufacturing facility operating in A, a nonsprinkler, brick facility or, B, a sprinkler, brick facility, not only in Georgia but throughout the United States, and I am quoting directly from number 2.

THE COURT: I think that can be narrowed.

MR. GINSBURG: May I explain why that is not broad?

THE COURT: You're asking him to search all his records –

MR. GINSBURG: We need it. Under the Insurance Law, Section 3105 defines what a material misrepresentation is. It says, "A material misrepresentation" –

THE COURT: Why can't he give you a sample? Why can't –

MR. GINSBURG: A material misrepresentation is one – it's only material if the knowledge of the facts would have led to the refusal by the insurance company to deny coverage.

It specifically says 3105, Subdivision C, "In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible."

We're entitled to discovery and to prove had they known, which they claim they didn't, that this was a sewing machine manufacturing facility, they still would have written the policy.

THE COURT: What about a request –

MR. GINSBURG: I would start with all policies written in Georgia.

THE COURT: Why don't you just ask if there's such a policy, and if so, how many. With a sampling of one –

MR. SURIANO: That is a Herculean task, even what you are suggesting. We're a big company.

THE COURT: How are they going to prove their case if you don't give them that discovery?

MR. SURIANO: That does not go to the misrepresentations, what they were.

THE COURT: Then you have to tell us what the misrepresentations are.

MR. BROWN: That is why I asked it.

THE COURT: We're talking not about the case in chief, we're talking about discovery.

If you are telling me that it's not something that they will require in order to make their case, you are going to explain to me why it is that they don't need it.

MR. SURIANO: Your Honor, even to begin – I am just stating facts, because I have spoken to my client.

In order to retrieve even the information that you –

THE COURT: No, you can't tell me it's difficult, that is not one of the standards.

You have to explain to me why it is that they will not need it for their case in chief.

MR. SURIANO: My understanding of the misrepresentations are, and I want to be very careful, because as I am saying –

THE COURT: Upon information and belief.

MR. SURIANO: I have not had a chance to develop it yet, but based on the information that is in our possession, this Debtor through its agent did not disclose the significant fact, material fact, that it was a manufacturer of costumes.

It was represented to us that what they did is simply a retail operation with several specific locations which were represented to be warehousing facility.

One facility had a showroom in it. We now find out after the loss and the investigation, that, in fact, they were manufacturers.

We also believe that there was a misrepresentation or an omission, if you will, with respect to the nature of one of the – with respect to the nature of the specific building in Georgia where the loss occurred.

THE COURT: The location?

MR. SURIANO: Yes.

THE COURT: I am not going into that at this point.

Could that change?

MR. GINSBURG: No, it underscores the need. They are saying we never told them we were a manufacturer.

In order to prove that was material, they have to demonstrate that they wouldn't have issued the insurance.

I am entitled to know whether they issued insurance on manufacturing facilities.

THE COURT: I think he is correct.

MR. SURIANO: That requires we're going to have to search our files –

THE COURT: You do have computers, don't you?

MR. SURIANO: No, Judge. We have some computers, but we don't have the submissions of what individual insurance had been rejected and accepted throughout the United States, proposed to our company –

MR. GINSBURG: I will start with accepted.

THE COURT: Yes, accepted.

MR. SURIANO: If your Honor is directing it, I will try.

THE COURT: Give it your best shot.

MR. SURIANO: Judge, even if I hit a home run, it is –

THE COURT: This Court is well aware of the task. Do what you can by the 26th. That is not necessarily an issue that may or may not be that important for deposition as it would be for the trial itself.

You can start on it now. Do as much as you can for the Debtor by the 26th, and all you can't do by the 26th, you continue to work until you have produced all those documents at least by the time that the District Court of this District decides to hear that matter.

MR. GINSBURG: That just guaranties that we don't get anything at the deposition.

I would ask at the least that the information, that the fact of such insurance being offered, be produced in some form, even if the backup documentation is not.

They have had adequate notice of these proceedings to do that.

MR. SURIANO: Were all

THE COURT: Counsel, I don't want to start giving him remedies under the Federal Rules of Civil Procedure and taking a negative inference by the fact that you do not produce something that will give him an idea as to what your client may or may not insure.

What I would suggest of course, I may not hear it , but what I suggest is you do due diligence in getting him by the 26th as much of that information as possible.

MR. SURIANO: I fully intend to comply with your order, and with all respect, I will try to move next week to get it stopped.

I don't wish to seem facile about what I just said. Please

THE COURT: I understand your problem.

MR. SURIANO: We think the Court is overbalancing its concern for the Debtor

THE COURT: They have got a lot of creditors out there that I have to concern myself with.

If it was just the Debtor, just an issue where the Debtor had paid all of it's money post confirmation, and this was a situation whereby it was going to fatten the coffers of the Debtor, as opposed to going out to pay creditors, I would not even allow expedited discovery.

This is a matter I really don't want to break apart, because having lived with this case for over a year and seeing this case come in in the condition it was in, I know this case is going to come back, those creditors, and all the professionals and all the others in this case, they will see almost nothing in Chapter 7, and that is the nature –

MR. SURIANO: It may happen.

THE COURT: That may happen. You may win this case.

MR. SURIANO: That is through no fault of our own, if that happens.

THE COURT: But you may very well wind up a winner. If that is the case, so be it, but I am not going to let you win by default.

You have to prove your case, at least before myself or before a District Judge.

MR. SURIANO: The last point, which is in response to one of the things that my opponent said is this, they can go out into the marketplace and try to place insurance for themselves.

THE COURT: That takes money. That is why they are in bankruptcy. They don't have an awful lot of that.

MR. SURIANO: I don't know what their financial condition is. They're in bankruptcy, so I assume they have a problem.

Again, as a last effort at trying to make – we're not responsible for whatever situation the Debtor finds itself in.

THE COURT: But you may well be, if later on it finds out that maybe you should have had coverage and you should have paid for the loss.

MR. SURIANO: I go back to the point – and they have admitted before you that the specific proceeds were never a part of the plan which you –

THE COURT: What they have said is that they needed all the proceeds, because like an alternative route, the other route was to generate enough accounts receivable, and they are telling me now that is not happening.

They – this is a long way from Halloween, and they make masks. They –

When is Mardi Gras? That is over also, that is February.

MR. SURIANO: Very well, Your Honor, thank you.

MR. BROWN: Your Honor, with regard to the document production, so that I don't lose sight of the forest for the trees, it should not be difficult to make quick production of the underwriting file for this risk.

That doesn't require computer analysis or great details. Could we ask the insurance company to at least make quick production of that file?

THE COURT: Here you have the experts that are saying that it shouldn't be that difficult.

MR. SURIANO: Really, they may be experts in their – the nonprivileged documents in the underwriting file can be produced. I don't have a problem with that.

However, it's a two-way street. I would request that my co-Defendants expeditiously produce a complete file in this case.

THE COURT: That is going to be done, I think.

MR. BROWN: We have no problem with that. We can do that within the next week.

MR. SURIANO: We don't have a disagreement on that.

MR. BROWN: I don't want to see the specific file in this case get lost, in the difficulty of producing these other things that have been asked for.

THE COURT: Very well. The Debtor's request for a Temporary Restraining Order was granted. You may submit an Order to that effect.

The parties are to move –

MR. SURIANO: I am sorry, Your Honor, I am going to reopen a can of worms here, but I have to do it.

It would seem to me that having my client go first will not resolve many of the issues, if, in fact, we're after an expeditious search of the truth, and since the Debtor noticed the deposition of the two brokers before they noticed mine, the only reason I suggested the 31st was in an effort to be expeditious as possible.

I am not trying to avoid the dates. I can do it the 31st. My request is I think it will be better for the case, both for the bankruptcy aspect of it, if the brokers go first, and I –

THE COURT: I don't really see it that way. I think that right now you are the Defendant in chief.

I think that what they are saying is that they want to depose the brokers just to see basically what they – what transactions they have with your client.

I think that in their minds your client is the culprit, not the brokers. So –

MR. SURIANO: Even though they sued them?

THE COURT: They want to make sure that they did what they were supposed to have done, as I see it.

As far as the deposition is concerned, I don't think it matters that much one way or the other as to who goes first.

Anything else?

MR. SURIANO: No, Judge.

THE COURT: Your motion is granted for the Temporary Restraining Order. The parties are to produce all documents possible, with minor exception, by the 26th.

The insurance company has to be deposed on May 31st. Your client has to be deposed on June 7th, Mr. Suriano and yourself, Ms. Stewart on June 2nd.

MR. GINSBURG: Ms. Stewart, does AIG insure Calvin Miller? I want to know if we have three heads of the same company that we're fighting.

THE COURT: Excuse me?

MR. GINSBURG: AIG is the parent company of the Defendant –

THE COURT: Do you wish to answer that now or have him –

MS. STEWART: Make your request. Let him do it the proper way.

MR. SURIANO: Judge, one thing, we need the Debtor's deposition.

THE COURT: Absolutely. I was wondering when someone was going to ask that.

MR. SURIANO: Can we do it on the 9th?

THE COURT: Before the 9th.

MR. SURIANO: Next week, Judge?

MR. GINSBURG: I believe Mr. Sherman's schedule – he is not going to be in the country. They also had five hours of deposition on March 1st in their office.

It's not as if they have not heard the Debtor's side of the story.

MR. BROWN: June 9th is fine for us.

THE COURT: All parties are to exchange whatever they give to each, they give to the other.

MR. GINSBURG: The Order submitted, I believe, Your Honor, said Temporary Restraining Order. Shouldn't that say the preliminary injunction is granted?

THE COURT: You are right, preliminary injunction.

MR. SURIANO: I can't do it June 12th.

THE COURT: What about before June 9th?

MR. SURIANO: I am not going to be available for that.

MR. BROWN: What about the 8th?

MR. GINSBURG: Fine.

THE COURT: Fine, the 8th.

MR. GINSBURG: Thank you.

CERTIFICATE

I, THERESA GLABIK, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That I reported the proceedings hereinbefore set forth and that the foregoing is a true record of the proceedings herein.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

/s/ Theresa Glabik

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC., M-47 (JMW)
AIMWELL PRODUCTS, INC., and
BEN COOPER SALES CORP.,

BEN COOPER, INC.,

Plaintiff,

v.

THE INSURANCE CO. of the STATE of
PENNSYLVANIA, Adv. Pro. No.
KALVIN-MILLER INTERNATIONAL, 89-5685 A
INC., and KERWICK & CURRAN, INC.,

Defendants.

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May 31, 1989
4:45 p.m.

Before:

HON. JOHN M. WALKER, JR.,

District Judge

APPEARANCES

LAWRENCE GINSBURG,
Attorney for plaintiff

COSTANTINO SURIANO,
Attorney for defendant Insurance Co. of
The State of Pennsylvania

VICTORIA STEWART,
Attorney for defendant Kalvin-Miller

GEOFFREY W. HEINEMAN,
Attorney for defendant Kerwick & Curran

(In open court)

THE COURT: Who is representing who here? The insurance company?

MR. SURIANO: I am. I am Costantino Suriano from Mound, Cotton.

THE COURT: Why don't you fill me in briefly on what happened in the bankruptcy court here?

MR. SURIANO: Yes, your Honor. The debtor in possession filed for bankruptcy roughly in April of 1988. In October of 1988, while it was a debtor in possession, Ben Cooper through its chief executive officer, Mr. Sherman, retained as we understand it the co-defendants, Kerwick & Curran and Kalvin-Miller, to procure a number of insurance policies and those brokers did that. In the course of procuring policies they procured one from ourselves, the Insurance Company of the State of Pennsylvania. In that process, however, we have alleged, the brokers made material misstatements of fact and misrepresentations and omitted key facts.

The debtor, Mr. Sherman, and in his affidavits and in his examination under oath transcript admits and sets out that he himself spotted the omissions before – right after they were made to the various insurers, including ourselves and put his agents on notice of the omissions. The omissions which are very germane to our case, Judge, basically they misdescribe the nature of what Ben Cooper does. We were not told that it was, I understand, the major manufacturer of Halloween costumes in the United States.

There are other misrepresentations which we won't get into at the moment.

THE COURT: The Halloween costume misrepresentation, is that a critical one as opposed to Christmas costumes?

MR. SURIANO: No. But the key there is manufacturing. We were told that that was simply a warehouse/retail operation. In fact, they have many many sewing machines and a major manufacturing operation throughout the United States. The premium that would have been in charged, indeed the form of policy that would have been issued is completely different.

THE COURT: When they are in manufacturing.

MR. SURIANO: Correct. I don't think there is any dispute about that. When the policy—

THE COURT: So you think you've got a pretty good defense because there was a fire and they are now making claim to you against that and you think you have a good defense to the claim.

MR SURIANO: Yes, we have a defense not only to the claim but we are seeking that the policy be declared void from inception and we think there has been fraudulent exaggeration of the claim. It is a state court contract dispute.

THE COURT: It in involves state law. We have on occasion all too often heard state law questions. But there you have it. It is a state law claim.

MR. SURIANO: We agree. We think that the critical distinction here and one that the bankruptcy court did not find in its discretion applicable and we disagreed with it and in all due respect to Judge Blackshear is what is set out in Pied Piper. And in my papers I have given the court the decisions as I gave Judge Blackshear those decisions.

The distinction is that here we have a post-petition debtor in possession who applies for and obtained insurance. And now,

in the regular course of its operation there is a contractual dispute with that insurer. The insured debtor in possession also has a dispute in negligence and in contract with its agents the brokers who supposedly, if one believes the debtor, didn't provide what they should have provided.

THE COURT: In other words, you want this case basically turned over to state court to be decided in state court.

MR. SURIANO: Yes.

THE COURT: Let me ask you something. First of all, what are the implications of whether there is a core or noncore proceeding as far as your application is concerned?

MR. SURIANO: I think it is critical. I specifically asked Judge Blackshear during oral agent and in my papers and even when I presented a counterorder to make that determination.

THE COURT: Did he?

MR. SURIANO: He didn't expressly address that. We say if you read the transcript and if you read his order it is an implicit determination by him that it is a noncore but related case. We asked him to do it. He didn't submit an order one way or the other.

THE COURT: What is the effect of whether it is core or noncore?

MR. SURIANO: Assuming that there is jurisdiction, and that's my first point.

THE COURT: Assuming that there is jurisdiction.

MR. SURIANO: The determination would be whether or not my client and indeed the co-defendants have a right to a jury trial.

THE COURT: If it is core what happens?

MR. SURIANO: If it is a core case there is some law that would stand for the proposition that Judge Blackshear can in the auspices under his jurisdiction, if you will, hear the case.

THE COURT: Without a jury?

MR. SURIANO: I am not sure if he can even do it on this case without a jury.

THE COURT: There is a greater chance that you would be subjected to a nonjury case if it is core.

MR. SURIANO: Absolutely.

THE COURT: Nonjury trial. If it is noncore?

MR. SURIANO: Then, if it is noncore we would the following, and it is set out in the statute, Judge Blackshear, he has to make conclusions of fact and law which can be submitted, if you were the judge, to yourself or to a district court judge and then, unless all sides agreed, we could, which in this case we do not, we would have a de novo trial.

THE COURT: You mean regardless of what he has decided you are not going to agree to what he decides.

MR. SURIANO: We think we have a right not to be in the bankruptcy court and, with all due respect to that court, we don't think that is that court.

THE COURT: Assuming he reached conclusions of fact and law and let's assume hypothetically they went in favor of the debtor and then those conclusions, they would be in the form of conclusions recommended to this court if it is noncore, is that right?

MR. SURIANO: That's right.

THE COURT: Under those circumstances what posture would you be in?

MR. SURIANO: We would be in the posture because we would have to come before you and have a de novo determination and have to retry, and we say with a jury, the very same things that we would have done already before Judge Blackshear.

And we think, and the cases that we have cited, Pied Piper and Blue Point, this court, Judge Sweet, clearly held in this kind of context it cannot be done.

I recognize that—

THE COURT: When you say it cannot be done, what cannot be done?

MR. SURIANO: Judge Sweet held that in the context of a jury trial demanded in an insurance case, it happened to be my same client, that clearly the bankruptcy court in that noncore matter could not hear that case. And what he did was he withdrew the reference and it was determined I believe by jury trial.

I think the case settled thereafter.

THE COURT: And then he tried it to a jury. Withdrew the reference and he was ready to try it to a jury and it settled.

MR. SURIANO: I think the case settled.

THE COURT: The key is whether it was core or noncore. That's a very critical determination, is it not?

MR. SURIANO: Assuming that the jurisdiction issue is decided against us, yes it is one of the critical distinctions. We asked the judge to make that determination and he explicitly did not but implicitly I think that he did if one reads the transcript and the exchange between the court and myself as well as the correspondence.

THE COURT: Why is the best approach to remand this for an express determination one way or the other before Judge Blackshear as to whether it is core or noncore?

MR. SURIANO: We suggested that but the court made it very clear, and I am using his words, that I had his blessings to come this this district court to make any argument.

THE COURT: But in the first instance it seems to me that it is for the bankruptcy court to determine whether it is core or noncore.

MR. SURIANO: And we asked him to do it and my position here is your Honor is that he has already spoken by his silence.

THE COURT: Maybe he has and maybe he hasn't but he has been silent on the subject. I think that the appropriate thing for me to do is to remand this solely for a determination by the bankruptcy judge as to whether this is core or noncore. He can do it or the basis of the existing record. No new facts need be adduced. He can hear counsel very briefly on the issue. Perhaps he won't even need to hear counsel. Perhaps he can fill in the blank as you will. And then at that point it seems to me that we are in a much clearer position. We need not guess as to what the bankruptcy judge has decided on this. And that's basically what you are asking us to do.

You are asking us to construe the transcript in a certain way. It is not necessary. It could be handled very quickly and then, at that point, to the extent your papers still make sense they could be utilized by you. Perhaps you might be surprised, there might be a finding in another direction. But there is no need for us to speculate as whether the judge made a noncore or core finding. So I think that's the way to proceed here at least in the first instance.

MR. SURIANO: We would appreciate from the court either an order or direction –

THE COURT: You will get a direction to that effect.

MR. SURIANO: – requesting Judge Blackshear to make that specific determination.

THE COURT: Yes. Without prejudice to your proceeding in any manner you choose thereafter.

MR. SURIANO: Very well.

THE COURT: Does any party have any problem with that?

MS. STEWART: No, your Honor. I am Victoria Stewart and I represent Kalvin-Miller International, a broker defendant in this case. We did not submit a set of papers for your Honor for a number of reasons. Essentially we felt that the arguments raised by the movants in this case also were with respect to the defendant Kalvin-Miller.

THE COURT: And you adopt them?

MS. STEWART: We adopt them. If we are before your Honor again after a determination by Judge Blackshear I would like to know if your Honor would like a separate set of papers although we feel that the issues were clear.

THE COURT: There is no need for a separate set of papers that are simply repetitive of what had already been submitted. You can adopt the arguments of co-defendants just as easily.

MR. GINSBURG: I am Larry Ginsburg, representing Ben Cooper. Let me just put this a little bit more in a factual context for you.

THE COURT: What's wrong with the approach, at least to the extent that we are now faced with a situation in which whether this is a core or noncore proceeding it is a matter that should be resolved clearly and the bankruptcy court, in the first instance having heard this and having set through all of this, familiar with the case is in the best position to make that determination.

MR. GINSBURG: I don't disagree with that, your Honor. All I would like to point out is that this is a Chapter 11 debtor with a confirmed plan providing for a hundred percent payment to

creditors. The final payment is due at the end of June. The reason that this entire thing was brought on was because the plan is threatened by the threatened termination of the insurance ab initio and by the lack of the payment of this claim.

Justice Blackshear set an accelerated schedule for discovery. All that these procedural happenings are doing is delaying that discovery. We have a June 15 pretrial conference date before Judge Blackshear. It is my belief that not only doesn't the transcript of the May 17 proceedings implicitly hold that it was noncore, I believe there is no question in my mind that Judge Blackshear at least with respect to the insurance company, will hold that it is a core proceeding. It might be a different standard with respect to the other two defendants.

So I have no problem at all with going back to Judge Blackshear on that issue. But what I would like clear is that this court is not otherwise issuing any temporary restraining order or injunction and that the parties are free to comply with the discovery schedule.

THE COURT: I am not going to. I am sending it back to Judge Blackshear for his determination. I am not reaching any other decision in this case.

MR. SURIANO: Your Honor, may I be heard because I had understood the court somewhat differently?

THE COURT: No, please, you seem to be in the habit of implying rulings and implying findings. When you are before a judge and you want something expressly on the record then it should be on the record. You cannot imply from anything that I have said that I have granted any kind of temporary relief to you or any injunction, preliminary or otherwise.

If you want that, frankly, I don't see why it is necessary because right now I'm sending this back to Judge Blackshear for a decision as to whether it is core or noncore, which is fundamental to this issue.

MR. SURIANO: Your Honor, if I may. I am requesting a stay, and in my papers I did so request of this court that until this court determines whether or not the issues raised on our motion are meritorious, that a stay of that portion of Judge Blackshear's order which directed all of the defendants, but particularly the insurance company, to comply with discovery, be stayed.

THE COURT: What is the discovery compliance date currently?

MR. SURIANO: Judge Blackshear determined that by May 26, which was last Friday, the insurance company was to provide all insurance policies that it had issued in the United States for A, non-sprinklered buildings, and B, sprinklered buildings, covering manufacturing facilities throughout the United States.

You have before you, your Honor, the affidavit of Richard Wurtzberg, the claim manager of Star Associates which is one of the managing agents of the insurance company. This is a Herculean task. The reason I brought it on by order to show cause, your Honor, is that first of all, we ought to not have any of this discovery which, by the way, includes the deposition on an accelerated basis not only of the insurance company but of the co-defendants.

And what I mean by accelerated basis, we were supposed to have depositions this week and the beginning of the following week. If your Honor were to simply stay that provision of the order until Judge Blackshear determines whether or not it is core, then, whatever that decision is, we can make a determination whether or not we wish to appeal to your Honor.

There are eight separate requests for relief that I have made of this court, the first of which was a stay in whole or in part of the bankruptcy court order. If I can step back a bit. That order not only granted the debtor in possession accelerated discovery which I have outlined, it also stayed our state court action in New York County, and it prevented or enjoined us,

the insurance company, from effecting a notice of cancellation under the policy of insurance which we seek to hold void ab initio but which they seek to enforce.

THE COURT: How much of what you have appealed here is an appeal as a right?

MR. SURIANO: I believe, your Honor, and that's one of the alternative bases of relief that I am asking you to find in my order to show cause and moving papers, that it is a final order particularly since he put in the preliminary injunction against us, the insurance company.

What Judge Blackshear did in his order is he said, A, accelerated discovery, B, produce every single insurance policy in the United States issued by your client—and we have the transcript here C, you can't go proceed with the state court action, D, you are preliminarily enjoined from cancelling the policy. And he did something else which we asked him in our papers not to do.

There is a dispute, a factual dispute between what the debtor in possession claims the insurance policy to be and what we the insurance company say it to be. They think it is one document; I know it's another. A jury will decide.

But what Judge Blackshear did in his order is he adopted their, the debtor in possession's, version of the insurance policy. Let me tell you why that's critical, your Honor. Simply this. In the debtor's version of the insurance policy it is creating coverage for the very thing that I said we never knew about, we never intended, namely manufacturing.

Judge Blackshear's order, with all respect to him, has the effect of adopting what they claim to be, they being the debtor in possession claims to be the policy and now we are ensuring manufacturing.

THE COURT: As far as the plan of distribution is concerned, what are the dates?

MR. GINSBURG: The final payment is due the end of June.

MR. SURIANO: There is one other point that I have to bring to this court's attention. Nowhere in any of the many pieces of paper submitted by the debtor in possession to Judge Blackshear in connection with their reorganization plan, nowhere is it stated that the insurance proceeds relating to this alleged fire loss are necessary to pay the creditors.

What they are saying is this. The reorganization plan which was executed or adopted by Judge Blackshear on April 4, 1989, has a reference to it that says in essence, "and the debtor in possession shall maintain insurance."

THE COURT: Let me just ask the debtor something. How is this possibly going to resolve itself before the plan under whatever scenario one looks at, the state court, Federal court, core, noncore, before the final payment?

MR. GINSBURG: All the arguments that we are hearing now are exactly the reason why this should be before Judge Blackshear, who has peculiar knowledge of it, on an expedited basis. There are certain things that were said that I have to respond to because you don't have the full flavor.

The full flavor is that there are three defendants here. The debtor paid money, paid in full, for insurance coverage. It was always contemplated that they had an insurance coverage. They either have insurance coverage from the insurance company or they have it from the two brokers. Curiously, the insurance carrier for the malpractice on the brokers is the sister company to the insurance company. What we have here is a three-headed tiger who are all coordinating the stall game to keep this thing out of district court on a very slow track in state court and that's the game that's being played.

There is something in his file, your Honor, that will end this, I believe. He doesn't want to produce it. Judge Blackshear said to produce it. This court should not enter a stay.

THE COURT: Surely that's not fault of the policy also nationwide.

MR. GINSBURG: He is also misrepresenting what was discussed before Judge Blackshear on that issue. We made four tier requests for documents, three of which he is not objecting to. His underwriting file, his correspondence with his brokers. He is not objecting so let him produce those today. That was our informal arrangement after we saw your Honor.

On the policies, there is a provision of New York State Insurance Law, Section 3105, that says in order for a misrepresentation to be material it must be such that an insurance company would not have issued the policy had it known the true facts. And it specifically says in support of the insured making that case they are entitled to know what the policies are and know what the other policies are.

Before Judge Blackshear we made a request for all policies they have written on sewing machinery factories in Georgia, all policies written on sprinklered and non-sprinklered which is an issue in this case in Georgia and throughout the United States. Before Judge Blackshear we discussed the Herculean task. We acknowledged it. We said by the 26th give us a list, let us know whether you have written two policies, let us know whether you have written five policies, let you the get a start and make due efforts to do it. The order doesn't require himself it requires him to make all due efforts to produce what he can produce. This is just not a fair statement of what happened below.

THE COURT: If this case were remanded to Judge Blackshear he would be able to deal with this within a day, wouldn't he?

MR. GINSBURG: I believe so. One other thing needs correcting. As to the insurance company here, under the settled law of the State of New York there is absolutely no right to a jury trial. So as to the insurance company whether it is core or whether it is noncore, they are going to Judge Blackshear.

THE COURT: That can be decided. I've decided what I am going to do.

MR. HEINEMAN: If I can just be heard for one moment.

THE COURT: I guess you have some information.

MR. HEINEMAN: Geoffrey Heineman from Ohrenstein and Brown, and I represent Kerwick & Curran. The only thing I want to make clear, indeed if your Honor is going to remand it for that issue I have no problem with that. My only concern is we basically have just been brought into this case and my concern is just that, the June 30 deadline, the expedited discovery. Counsel for the insurance company and the debtor have been going through informal discovery since January since the January loss. We have not been a participant.

THE COURT: This is perfect matter for you to take up before Judge Blackshear at the time he rules whether it this is core or noncore. I am now directing that this case be remanded to Judge Blackshear sheer for an express finding as to whether this case is core or noncore. Matters of discovery are to be taken up before him, any arguments as to extensions will be listened to sympathetically by Judge Blackshear. I, however, will not stand in his shoes and try and second-guess him on that.

Your right to return to district court remains inviolate and in the meantime I will enter a stay of time, I will toll the time period that is required for discovery between now and the time Judge Blackshear rules. The stay will lift as of the moment he decides whether this is core or noncore. That's the decision.

MR. GINSBURG: Just procedurally, will this court issue that directive to Judge Blackshear—

THE COURT: It is on the record right now. It is a matter of court order. No further order is necessary. The matter can go before Judge Blackshear. Either party is free to bring it to Judge Blackshear's attention as to what the court has just ruled.

MR. GINSBURG: Will this file be transmitted to Judge Blackshear with the current briefs submitted to this court?

THE COURT: Certainly.

MR. HEINEMAN: We attempted to file originals of our cross-motion with the clerk office and they indicated they couldn't take it until it had a number.

THE COURT: We have a miscellaneous number because this is Part One.

(Concluded)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of

	Case No.
BEN COOPER, INC.,	88 B 10484
LIGHT MANUFACTURING CO.,	88 B 10547
AIMWELL PRODUCTS, INC.	88 B 10546
BEN COOPER SALES, CORP.	88 B 10770

Debtors.

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June 15, 1989

United States Custom House
One Bowling Green
New York, New York 10004

s/c Debtor v. The Insurance Company of the State of Pa. – Pretrial Conference

M/M for Determination of Core v. Non-Core

B E F O R E:

HON. CORNELIUS BLACKSHEAR,

Bankruptcy Judge.

A P P E A R A N C E S:

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BY: ANDREW P. LEDERMAN, ESQ., of Counsel

PROCEEDINGS

MR. SURIANO: I am not sure what the protocol is as to who goes first. I represent the Insurance Company of State of Pennsylvania.

You might recall that we were before you in the context of the Ben Cooper case relative to the adversary proceeding brought by Ben Cooper against the insurance company and the two brokers.

Your Honor made a ruling from the bench on or about the 17th of May which was reduced to an Order on or about the 24th of May.

There was then a motion practice — motions were made. I brought a motion on behalf of my clients before the Honorable Judge Walker in the District Court seeking various relief from Your Honor's ruling.

You might recall you blessed that, and I think I quote you correctly, that motion in the sense that you told us, go right ahead.

Judge Walker decided at oral argument from the bench that before he could, or should address any of the issues that were raised in our motion, that he ought to remand to yourself the specific question whether this case, with all its facts and circumstances is a core or noncore proceeding.

And while it was my view that we were going to have more motion practice, I question what has happened is, each of the sides have submitted some additional or supplemental memoranda to yourself, Judge, as well as the papers that were before Judge Walker.

And we are now here for, I suppose, the Court's argument relative to the core or noncore issue.

I don't know to what extent the Court has had an opportunity to review the voluminous papers.

THE COURT: I have reviewed them.

MR. SURIANO: With respect to the adversarial procedure, and it's our position on that, this case should, if it is to be heard in the Federal system should be heard by a District Court and not by Bankruptcy Court.

In the main our argument is, if there is jurisdiction, and setting that aside, then because it is –

THE COURT: I thought the last time that you were here we discussed the fact that the core and noncore, not being jurisdiction because of the fact that, if you are correct, what happens when bankruptcy case – because of the Marathon decision and because of the amendments to the Bankruptcy Code in 1984, what happens is that now the matters are – the bankruptcy cases are basically assigned to the District Court and the District Court then refers the matter to the Bankruptcy Court.

By an order of Judge Motley, or Judge Brient, whoever was Chief Judge, they referred enmasse all bankruptcy cases to the Bankruptcy Court here in the Southern District of New York.

There's not a question of jurisdiction. What the question should be and the parties should focus, and it's a two part question, you have to get over the hurdle of core.

If the case is a core matter, then I don't really need to go any further if I make that determination.

But if I decide it is a noncore matter, then we get to the case where Judge Sweet revoked the reference of Judge Buschman for the purpose of hearing the case because he felt it would be a waste of judicial time for him to have two injury trials on one case.

And in addressing that issue, we need to address the issue as to the rights of the jury trial, as to whether or not this is a legal

issue or equitable issue that this Court has to address this morning.

If you frame your argument within those issues, I think that we can get this case going as far as core versus noncore.

Quite honestly, you have a very difficult road to travel in convincing this Court that an issue such as the issue that is before me today is not a noncore matter.

Although all the parties are focused on one particular section under 157. I see this also as part of an administration of the case.

MR. SURIANO: Your Honor, I will focus in — or attempt to focus where the Court is directing me.

With all due respect, we think that, despite what you said, it doesn't belong in this Court, it's not a bankruptcy matter. We're not conceding that point.

THE COURT: I don't anticipate you conceding it. I was just attempting to tell you where my mind has been guided based on the papers that I have read and that have been supplied to me by the various parties.

MR. SURIANO: Briefly, Your Honor, we believe that this is a — the issue in this case deals with whether or not a contract of insurance was formed.

THE COURT: I think when you discuss that also, you need to address the issues that I find are relevant and that is the fact that the — when the contractors are prepetition or postpetition.

MR. SURIANO: I agree. There is no doubt and no dispute that the insurance contract, if it exists was formed postpetition.

This is a Debtor in Possession who retained two brokers, our co-Defendants sitting here, to procure various insurance policies, one of which was a binder, and there's a dispute as to what the policy is.

THE COURT: That is not really for the actual trial itself.

MR. SURIANO: We say the policy is one document and they say it's a combination of another document.

Setting that aside, the contract, if it exists, was formed after Ben Cooper was in bankruptcy in the reorganization context.

Now, it's our view that the law is that a Debtor in Possession who in the ordinary course of his business as a Debtor in Possession enters and negotiates into contracts, does not, by the very fact that he is a Debtor in Possession, have the right to go into the Bankruptcy Court to adjudicate any controversies that might arise as a result of that contract.

THE COURT: I am going to interrupt you. I want you to focus on the issues as I see them. I want you to address those issues.

That is notwithstanding the fact that within the Order that this Court signed, it reserved the right to review any controversy that may arise after confirmation.

MR. SURIANO: That is our position. The Court reserved to itself a particular right in language proposed by the Debtor and adopted by the Court and it's so ordered.

I have reviewed again the record, because I was not so sure on May 17th what I had said to you, whether it was correct.

And I now can tell you that I believe it is still correct.

Mainly that the only reference to insurance in the plan that was adopted, on May 4th, I think, '88, by this Court, is what I would call the catch all provision that the Debtor in Possession was to maintain insurance.

In other words, there is no — I think the Debtor has said this on the record — there is no statement to this Court that the proceeds of that insurance policy were necessary —

THE COURT: You are straying from the issues I am focusing on. I am not focusing at this point on whether or not the proceeds from an insurance policy is necessary for the plan.

What I am focusing upon is that within the plan itself, the plan of consummation that I signed, the Debtor reserved the right to come back to Bankruptcy Court to resolve any issues that may arise out of the fact that this case was confirmed.

MR. SURIANO: Our short answer to that is, we believe that that was inappropriate for the Debtor to have reserved that authority.

THE COURT: Why?

MR. SURIANO: The case law that we have cited to you stands for the proposition that is against public policy of having a Debtor in Possession go out and act in the normal course of its business in order to get out of bankruptcy.

THE COURT: The Debtor is not out of bankruptcy upon the plan of consummation. After plan of consummation, you have substantial consummation of the plan. And until you have substantial consummation of the plan, the case still remains a bankruptcy case, because if the plan is not consummated then the Bankruptcy Court must then rule whether or not the Debtor has the opportunity to resubmit an amended plan or – convert one under Chapter 7.

MR. SURIANO: We don't think that the Debtor can create something that it didn't have by statute.

The portions of the statute that you are quite rightly pointing out to us, I think, are not intended to deal with the public policy decisions that are in the case law to say, look, if a Debtor in Possession goes to Con Ed and orders electricity and the Debtor in Possession for some reason doesn't pay for that electricity, the Debtor in Possession does not have a right to dispute the obligation.

THE COURT: What if the Debtor paid -- suppose the Debtor paid Con Ed and Con Ed said they did not pay them. And Con Ed commenced to cut off the electricity of the Debtor.

Are you telling me the Debtor does not have the right to come back into the Bankruptcy Court.

MR. SURIANO: He has the right to go to the normal Courts that it would be required to do.

THE COURT: One step further, then, suppose that there was no disagreement between you and the Debtor as to the insurance plan, and suppose the Debtor instead of paying one lump payment were to pay, have paid one-third upon the binder and subsequent three months paid another one third and finally paid a final one-third.

Are you telling me that at that point you wouldn't have the right to come in and establish your claim as a claim that should have priority over other claims under 11 U.S.C. 503?

MR. SURIANO: We would first, as we did in this case, we started the action first, we went to the State Court and started an action against Ben Cooper, and we demanded certain relief.

THE COURT: And also I think we indicated at the last hearing that you may have technically been in violation of the automatic stay, is that not correct?

MR. SURIANO: I don't think so. Because --

THE COURT: The case is not then closed. If the case is not closed, the automatic stay still stands in effect, because 11 U.S.C., the automatic stay becomes effective upon the filing of the Petition and stays there until the closing of the case.

MR. SURIANO: Our decision to go to the State Court lays, or -- the fountainhead of that decision is our belief that when you have a Debtor in Possession it's a different kind of animal and that a Debtor in Possession just can't waltz into the Bankruptcy Court when it has a dispute on a normal contract, whether it exists or not.

THE COURT: Wait a minute. I think you have really expanded upon your theory now. You are telling me that preconsummation the Debtor could not do that?

MR. SURIANO: I am responding to your question, are we in technical violation. I don't think so.

THE COURT: That is not the issue.

MR. SURIANO: You stayed that anyway.

To go back to the main thrust of the argument, we think we shouldn't be here for the reasons that I have said.

Your Honor, if we're incorrect, then you have to decide, as Judge Walker has asked you to, whether it's core or noncore.

Now, there are a number of enumerated grounds in our briefs. And to that extent, I have joined the brief of co-Defendant KC insofar as that brief discusses what the Debtor in Possession believes to be the basis for core jurisdiction.

I am not going to go through each one.

We did that in the brief.

THE COURT: I think you should go through the one that you feel is the strongest.

MR. SURIANO: I don't think that he has asserted under any of the provisions that designate the types of core and noncore matters.

THE COURT: What about L, that is consummation of plans?

MR. SURIANO: The consummation – Going back to the same points that you raised originally, my answer is, we don't think –

THE COURT: You said he did not address it. I know I –

MR. SURIANO: He did address it. I misspoke if I said that. He raised it. I don't think there are meritorious grounds, but he did raise it.

And Mr. Heineman in his brief went through each of the elements and gave case law why he thinks, and I adopt – he being Mr. Heineman – I adopt, should not persuade you to make this a core proceeding.

I would like to talk a few seconds about the jury question. The first time that I appeared before you, I had no papers and I think the record will reflect I said, Your Honor, I believe this is going to be a jury case and that with all due respect it should be tried in the District Court.

You said, let's put some papers together and let's see.

A lot has passed since then. The seventh amendment right of my client to a jury trial is inviolate. And case law from Marathon on down stands for that proper position.

THE COURT: If he is entitled to a jury trial.

MR. SURIANO: Your Honor, my client is entitled.

THE COURT: I want you to address this issue, notwithstanding that I view what the Debtor is asking as equitable in nature as opposed to legal.

MR. SURIANO: With all due respect we disagree with that determination, if you finally made it.

THE COURT: Let me tell you how I reached that determination, so you can address it.

The Debtor is not asking, really, for you to give money at this point. What the Debtor is asking is that you honor a contract as they view the contract.

Now, if as a result of you honoring that contract, you then have the opportunity to come back and say that he was in

violation of that contract, then – right now the Debtor is saying that you have to honor the contract as they view it.

I am not going to get into the issues as to the differences of opinion. But what he is saying is that not at this point you owe me money, because if there is no contract, we never get to the monies issues.

So, therefore, that to me is equitable in nature as opposed to legal in nature. Because he is asking you, he is basically asking for a sort of a reverse injunction.

MR. SURIANO: I think that you have to look, sitting at Bankruptcy Court, Judge, have to look to what New York State law would do. And it's clear, despite the misstated –

THE COURT: New York State law? Where was the contract entered into, it says New York State law.

MR. SURIANO: In determining – yes, on the contract question, yes.

THE COURT: Which contract?

MR. SURIANO: Whether or not there is a contract.

This Debtor in Possession is asking for money damages. He has three, four causes of action in his adversary Complaint.

THE COURT: But I ask you this question, once I make the determination as to whether or not there's a contract, and which contract is in force, doesn't the money damages sort of flow from that?

MR. SURIANO: No, two reasons. A step back, Judge. The first reason, it's been decided in the Southern District, Pied Piper, Bluepoint.

Specifically and, in fact, in Pied Piper it was my same client, that we have a right in the jury trial in an jury context.

THE COURT: More specific as to Pied Piper, I have had an opportunity to look at that case also.

Was that the same issue that is the issue here today?

MR. SURIANO: There were several issues.

THE COURT: Were any of the –

MR. SURIANO: Were –

THE COURT: Not noncore or core, were any of the issues as to whether or not a contract existed, and if it existed, which contract existed because of your contention of if there's a contract, this is the contract, and the Debtor is stating, that is not the contract they entered into?

MR. SURIANO: I will respond to the second part first, the Debtor is seeking in excess of $2 million damages. And that is in their Complaint.

THE COURT: Let's deal first with whether or not the issues that I – as I view them, that are the heart of this particular case, as to whether or not those were the issues in the Pied Piper case.

MR. SURIANO: I think that at the end of the day our conclusion is that they are inextricably so intertwined that the Court has said in this kind of case you have absolutely a right to a jury trial.

THE COURT: You can go back now – I am sorry I had to do this, but if this is a core matter and you have the right to the jury trial, how is this the same as Pied Piper?

Because in Pied Piper I think it was considered to be a noncore matter and as a noncore matter, the reason that Judge Sweet revoked the reference was because he felt that it would have been a waste of judicial economy to have two trials, because as we know the Judge, in a noncore matter, the District Court, must review the matter de novo.

If that is the case, would you explain to me how, in making the determination today that this is a core matter, how do we have the same factual situation as you had in the Pied Piper case?

MR. SURIANO: I think it will be slightly different. I have not –

THE COURT: Would we have a waste of judicial economy?

MR. SURIANO: Yes.

THE COURT: If it's a core matter, it goes on appeal, it's not reviewed de novo. That is why I focused on core, noncore, not being jurisdictional, but how it gets to the next level.

MR. SURIANO: I think the answer is, it's my sincere belief, that a Bankruptcy Judge not being a full Article 3 Judge with the full powers of an Article 3, in view of cases like Pied Piper –

THE COURT: Can I have a jury trial –

MR. SURIANO: (Continuing) – should not in this case – I won't make sweeping statements to the Court, in this case – should not have, if you determine it's core, you should still send it to the District Court.

THE COURT: Why?

MR. SURIANO: In an insurance context or a context of a regular lateral contract obligation of Debtor in Possession it's outside of the scope of what a Bankruptcy Court Judge should do.

THE COURT: Notwithstanding Section 364, 5, which deals with executory contracts that this Court deals with on a regular basis within a bankruptcy context?

Because there this Court has to determine whether or not there's an executory contract, Section 365, whether or not the Debtor has a right to assume or assign that executory contract or to reject that executory contract, notwithstanding that you feel that this Court should not deal with an insurance contract?

What makes that more unique than a labor contract, for example?

MR. SURIANO: I understand the Court's distinction. I think what you're asking me to do is to say what, if you determine that it is core, what our remedies could be after that.

THE COURT: No, I am not asking you that. What I am asking you is, if I determine it is core, why is it that this case should be considered in the same vein as the Pied Piper case, because the only reason Judge Sweet decided to revoke the reference is because of judicial economy, I think.

And I want to know what would be the judicial economy, because if I decide it's core, then you have a right to appeal.

If it's noncore, it must be reviewed de novo. And there is where you have the judicial economy issue, because by rights you have a right to review de novo.

And so, therefore, if I decide that it's core, I think that this Court can have a jury trial, because Bankruptcy Courts have conducted jury trials before, what would be the difference in us having the issue decided here as opposed to the District Court?

MR. SURIANO: I go back to my position that I just believe, and we will look again to see if there is any decided case law on this, I don't think that there really is, that it's simply not within the Bankruptcy — it's not what the Bankruptcy Court was intended to do for this type of case.

THE COURT: And it's a novel one. This case is novel?

MR. SURIANO: Yes.

THE COURT: Why?

MR. SURIANO: I am following up on your assumption that you are going to rule that it's core, and I am urging you that it's not core, but —

THE COURT: Change my mind.

MR. SURIANO: I will address changing your mind in a second. If you want me to answer what I think on the – if you decide it's core, yes, I think you are right, we do have a right to appeal, and we might or might not do that.

I think – the cases talk about the District Court not exactly on points, but in analogous cases the District Court being better equipped and jurisdictionally more appropriate to have this controversy reviewed.

THE COURT: Would you –

MR. SURIANO: One additional point.

THE COURT: I want you to explain to me two terms that you used. You said, I think, that they were better equipped, and what was the other matter that you raised?

MR. SURIANO: It's just not what the Bankruptcy –

THE COURT: Right, what the Bankruptcy Court should be doing.

MR. SURIANO: Right.

THE COURT: And what was your third?

MR. SURIANO: The other point simply went to, going back to earlier points, that other Bankruptcy Courts, Judge Celia Gertz in Bluepoint, when she was confronted with a very, very similar question in a reorganization plan, she said that even if it were a rereorganization plan, she would remand it to the District Court, because it –

THE COURT: She could not remand it to the –

MR. SURIANO: By her own motion she would refer it to the District Court.

THE COURT: And do you remember what happened in that case when she did refer it?

MR. SURIANO: Yes.

THE COURT: What happened?

MR. SURIANO: It was settled.

THE COURT: I was very interested in seeing what the District Court's reaction would be if a Bankruptcy Court referred a case to it.

MR. SURIANO: I think that it accepted the reference, or the revocation of the reference.

THE COURT: She cannot revoke –

MR. SURIANO: Yes, but just so I get my terminology correct.

THE COURT: She sort of referred it. She has not authority –

MR. SURIANO: Only the District Court can revoke the reference?

THE COURT: Right.

MR. SURIANO: It's my belief from reviewing the settlement papers that the next step in that case, because I also obtained their file, that the next step was that the Court accepted, and there was some pretrial thing that went on, and the case settled.

THE COURT: Pretrial conference hearing. It would probably be very interesting for this case to have been involved, or had a record of that conference as to the issues that must – it must have been a very interesting conference.

MR. SURIANO: I can't represent that that issue arose.

THE COURT: I am quite sure it did.

Continue.

MR. SURIANO: Your Honor, I think that going back to the jury —

THE COURT: Before we go back, now that you have finished your third point, let's deal with the fact that the Bankruptcy Court is not equipped, and why would you think that in this particular case, especially since the Bankruptcy Court deals with contracts on a regular basis when it is asked to have the contract assumed and assigned, or to be rejected, such as one of the matters that calls the amendment to the '86 Code and there was a union contract.

There's a contract that you need. There's a contract that has two Federal statute Orders.

In fact, there was a case, if I remember correctly, that came down in the slip opinions as to the jurisdiction of the Bankruptcy Court as opposed to the jurisdiction of the Federal labor reorganization.

So now I want to know why this contract is so unique and has those kind of issues that a Bankruptcy Court is not equipped to deal with it?

MR. SURIANO: Intellectually the Court is equipped.

THE COURT: I am quite sure you didn't mean that when you —

MR. SURIANO: I just want to make that clear. It is equipped to deal with those issues.

THE COURT: Do you think that you could get a case heard quicker in District Court then you can in the Bankruptcy Court, notwithstanding that the first priority must be criminal cases?

MR. SURIANO: I am not sure what the speed relative of the District Court versus the Bankruptcy Court is. I don't have statistics in front of me.

My guess is that the Bankruptcy Court are a bit speedier in resolving issues then the District Court. But speed not the only issue.

It's whether or not the Court hearing has the – I am going to use a word that has – has the jurisdiction or the authority, to hear the matter.

So speed is one of the factors that goes into a Court's mind in deciding whether or not to accept or reject the matter of a particular matter.

THE COURT: Wasn't it the philosophy, or wasn't it what was meant under the Code for Bankruptcy Courts to hear these matters, would you mind expounding on that?

MR. SURIANO: Yes. But where I got the notion that, if you will, that Bankruptcy Courts are not equipped, it's in one of the cases that was cited to you where I believe there was a Long Island – out in Hauppauge, the Bankruptcy Court, in a very recent opinion said among other things in referring a matter back–

THE COURT: Not – referring it to the District Court?

MR. SURIANO: Yes. – it's just not equipped to handle it. And I am reciting it. It's referred to in the Acolyte case.

THE COURT: That was an insurance contract type case?

MR. SURIANO: No, I don't think so.

THE COURT: What type of case was that?

MR. SURIANO: I will have to tell you by referring to my brief, and I will be happy to supply that information to you.

THE COURT: Is it in your brief?

MR. SURIANO: The reference is to the case that cites that case. I believe it's the Acolyte case.

THE COURT: Could you give me a factual specimen that I can compare to this case?

MR. SURIANO: Not –

THE COURT: I have a type of case – the type of issue that the Bankruptcy Court thought it wasn't equipped – felt it wasn't equipped to handle.

MR. SURIANO: The one I am referring to is cited by Judge Holland in the Acolyte case. I am not saying it's the Acolyte case that said it wasn't equipped.

Acolyte dealt with a Debtor's action to collect for services rendered pre Chapter 11 filing.

THE COURT: You mean an account receivable?

MR. SURIANO: Yes.

THE COURT: And the Judge in that case said that the Bankruptcy Court was not equipped to handle that type of an issue?

MR. SURIANO: No. To be precise, the reference that I am making to the non – to a Bankruptcy Court Judge, and it's a failure–

THE COURT: This is a Bankruptcy Court?

MR. SURIANO: It's a failure of my memory to give you cite of the Court that said that. It's my belief that that is discussed in the Acolyte case.

THE COURT: Let's go to the other issue, and that is what the Bankruptcy Court was established to do.

I may be paraphrasing, but that is the sense I got out of your statement, that I should not hear this matter, because that is not what Bankruptcy Courts are to be doing in dealing with bankruptcy issues.

And I would like to know what basis you make that statement on?

MR. SURIANO: I go back to the argument that I raised earlier. It's all in our papers that public policy is –

THE COURT: Which public policy is this?

MR. SURIANO: Of a Debtor in Possession not being in – should not be able to come in –

THE COURT: Long after the case has been confirmed, is that your statement?

MR. SURIANO: Well –

THE COURT: Or immediately after the case has been confirmed, or that the Bankruptcy Court should not contain jurisdiction to hear disputes arising out of consummation or out of the bankruptcy case?

MR. SURIANO: In this case, I think our position is that this Debtor should not be permitted to come into the Bankruptcy Court to – and this is our view, drag in disputes that are outside of the purview of the bankruptcy.

THE COURT: Therefore, it's up to me to make a determination as to whether or not this dispute is within the purview of the Bankruptcy Court.

MR. SURIANO: That is one of the things –

THE COURT: If I decide that it is within, you are saying, then, that argument doesn't stand.

But if I decide it's without, then you are correct. I have to have an option here now, that I – because you are saying that it is not within the purview.

My other side says that it is. So your argument when you make the statement as to whether or not this is an issue that was meant

for Bankruptcy Courts to review, that you are saying that I shouldn't be reviewing it because it is not within the purview of the bankruptcy case, and that is the public policy.

MR. SURIANO: Yes, and I am citing the case law –

THE COURT: I agree with that statement. I think that if I make a determination that it is not within the purview of the bankruptcy case, then you are absolutely right, that the Bankruptcy Court should not be using its jurisdiction, although I don't like to use that term, because it's confusing in this case, should not be reaching out and bringing cases into the Bankruptcy Court that rightfully belong in other Courts.

And I agree with that position one hundred percent.

Continue.

MR. SURIANO: I want to touch on the jury question. I don't think that we resolved one of the questions that you posed to me. If we did, stop me.

I think, Judge, that you have to decide whether you believe we're entitled to a jury trial.

I have cited a complete thorough list of cases that are going to assist you in reaching that decision.

You raised the points, if I may paraphrase the Court, what –

THE COURT: If you paraphrase too far off, I will correct you.

MR. SURIANO: What if it's a Complaint that has equitable and nonequitable causes of action?

THE COURT: Let me see if I can sort of send you down a path that you will address the issues in some – in a logical manner.

If I decide it's a core matter – I will agree – let me tell you where I will agree with you.

I think Pied Piper is right in the sense that it is a noncore matter. I also believe in judicial economy. And if I decide it's a noncore matter, we don't need to reach the other issues because it's going to be withdrawn because of the Pied Piper case and Judge Walker will agree with that, I think.

However, if I decide it's a core matter, the first issue that we have to address is the fact as to whether or not you have a right to a jury – the first issue – is I think it makes having a jury trial irrelevant, in the sense that once I decide it's core, is that this Court will conduct the jury trial.

But if you are saying, well, maybe there's a question as to whether or not this Court can conduct a jury trial, then we get to the next issue as to whether or not you have a right to a jury trial.

So if you address it in those stages, fine.

MR. SURIANO: I think if you decide it's core, there is a very serious question in my clients' minds whether or not even if you – if this Court believes that a jury trial – that it can conduct a jury trial, whether that is a correct expression on these facts.

THE COURT: Let me see if I cannot focus you on a more practical vein. If I decide it's core, you are going to – still going before Judge Walker.

He will have an opportunity to decide whether I was correct whether it's core or not.

Then what will happen, if he decides that I was correct that it was core, he is going to more than likely send it back here, notwithstanding the fact that you think maybe this Court can or cannot conduct a jury trial. If I am incorrect, then it's all for naught, because if I am incorrect as to the core versus noncore, then he is going to revoke the reference.

Then I am saying why are those issues important. More important is the issue of whether it's core or noncore. I don't think

the jury trial has that much of a weight in my determination as to core or noncore. That only happens after I made the determination of whether it's core or noncore.

MR. SURIANO: I just disagree with you.

THE COURT: It's your right to disagree.

MR. SURIANO: With all due respect –

THE COURT: Do you understand what I am saying?

MR. SURIANO: I understand your line of reasoning.

THE COURT: Once I make the determination of core or noncore, you still have to go before Judge Walker, because he said he remanded it, he didn't overrule me. You still have to go before him.

Once you are before him, he is going to make determination as to whether it's core or noncore. And nowhere do you find in 157 any reference to core or noncore as to jury trials.

MR. SURIANO: Why do we have to reach that now as to what is going to happen at the next step?

THE COURT: That saves us – the same reason Judge Sweet in the Pied Piper reached it in judicial time.

We don't need to deal with that issue today, because it is not something that goes into the formula of core versus noncore. Jury trial is not an issue of core versus noncore. It becomes an issue only after noncore.

As Judge Sweet reasoned in the Pied Piper case, I think if that had been determined to be a core matter, then I don't think that Judge Sweet would have ruled the same way because there would not be a judicial economy issue then.

MR. SURIANO: Going back to our position which is, there's a serious doubt in our mind as to whether should Your Honor

determine that this is a core matter, and should Your Honor also then determine that you would conduct a jury trial, that under the facts of this case, you could do it.

I wish I could cite a case one way or the other that would say you can or can't. I can't do that.

I am arguing intellectually with the Court based on expressed opinions of other Judges and what I think, certainly what our position is.

I don't think it appropriate to discuss the other branches of the relief that I have suggested. We have discovery dispute, we have the stay issue.

Because I think you are focusing on the core or noncore. And things will naturally flow or emanate from that decision. And rather than take up time discussing those, I am going only to reserve my right to address them if the other side brings it up.

I am asking that the Court determine that this is a noncore proceeding and that if at all should be heard by the District Court.

THE COURT: Very well. Anyone else?

MR. HEINEMAN: I am Geoffrey Heineman. I represent Kerwick & Curran. I think that we have submitted a brief which addresses the reasons why we believe, especially as to our clients, where there are negligence claims and as to our clients where we don't believe the claims arise, unless Your Honor makes a finding that there is no insurance policy, that the matter is really a noncore proceeding as to us.

THE COURT: If I determine it's a noncore matter?

MR. HEINEMAN: Well, we believe it's an noncore matter.

THE COURT: I know that.

MR. HEINEMAN: If your Honor makes a determination that the insurance policy is in effect, then it really isn't a claim as to us.

THE COURT: That only comes after I may make a determination.

MR. HEINEMAN: The claims as to us, we believe, really are noncore. They don't seek relief as to us under specific provisions of the Bankruptcy Act. It's an negligence claim.

THE COURT: You are not telling me that in order for a Debtor in Possession or Trustee to bring suit against a party it must be a specific provision of the Bankruptcy Court?

MR. HEINEMAN: No. The relief that they seek which is money damages, which is all they can get from an insurance broker, he can't give them insurance, it's not equitable, only legal relief. I am saying that wouldn't fall within the definitions of the core proceeding.

THE COURT: Why not? If you had entered into a Contract of Sale, let's say, the Debtor was selling you property under the Bankruptcy Code preconsummation and you put down ten percent of the purchase price and didn't consummate the deal, are you telling me that is an issue that a Bankruptcy Court could not hear?

MR. HEINEMAN: I am not.

THE COURT: That is all they would be seeking, that would be money damages.

MR. HEINEMAN: In this particular instance there is no contract claim against my clients. It's solely for negligence, the claim against my clients. And a negligence claim —

THE COURT: Let me reverse it then, if the Debtor didn't perform some services that he was obligated to do to your client

in the Bankruptcy Court, are you telling me that you have the absolute right, notwithstanding the automatic stay, to go outside to another form to raise that issue?

THE COURT: In the context of a contract or just –

THE COURT: A negligence claim; let's say, you slipped on the Debtor's property and broke your leg.

MR. HEINEMAN: In that instance we would be seeking relief against the Debtor, specifically assets of the estate, that would fall within the definition of the core proceeding.

THE COURT: What if the Debtor slipped on your property?

MR.HEINEMAN: First of all, I believe there's an exception in personal injury.

THE COURT: Except in personal injury against the Debtor prepetition if you are talking about those cases that the Congress addressed because of the Johns-Manville case.

MR. HEINEMAN: If the Debtor slipped and has a personal injury claim against a third party, no, I don't believe that would fall within a core proceeding.

They would then be characterizing a straight State law claim, negligence claim, bringing that within the jurisdiction of the Bankruptcy –

THE COURT: You mean State Court claims cannot be brought within the jurisdiction of the Bankruptcy Court?

MR. HEINEMAN: I am not saying that. In Marathon, the Court addressed the issue –

THE COURT: But there's been legislation since Marathon in 1984 when the Bankruptcy Court was amended.

So, therefore it addressed the Marathon issued and codified Marathon through sections 28 U.S.C. 157 as well as 28 U.S.C. 1334 which deals with jurisdiction. That is why I keep addressing you, Mr. Suriano, 1334 is the jurisdiction of core versus noncore.

As I read 1334 it has concurrent jurisdiction.

MR. HEINEMAN: I am not disputing whether the Court has jurisdiction. I don't believe a negligence action by a third party falls within a core proceeding.

I believe it's within the definition of a noncore related to the proceeding, because it's –

THE COURT: Even though if affects the administration of the case?

MR. HEINIMAN: I don't think within the definition of a core proceeding you can bring within it, just because a matter has to affect administration or will bring assets in – the cases that we cited in our brief indicate that is not a sufficient reason to find a core proceeding. That is what I am saying.

MS. STEWART: We have not submitted papers before this Court. We did not submit papers before Judge Walker. When we were before Judge Walker, I indicated that I adopted the arguments made by the movants on behalf of my client, Calvin Miller, who is a broker in this action.

Today before Your Honor I would like to adopt the arguments created by Mr. Suriano and Mr. Heineman.

MR. GINSBURG: I am Lawrence Ginsburg. I am appearing on behalf of the Debtor.

I believe the oral argument this morning coupled with the papers submitted clearly set forth the argument made by the Debtor that whether or not a matter is a core proceeding is not in and of itself determined by the nature of the claim, but determined by the effect of the claim on the administration of the estate.

The cases cited by the Debtor make it very clear that included within the other subcategory as to the consummation of a plan, are the instances where the effective dispute affects the consummation of the plan.

In a case like this where the consummation of the plan scheduled to be concluded this month is directly threatened, that cries out for an application of the consummation subsection.

There is no real question, Your Honor, and I don't believe any cases have been cited, that hold for the proposition that this claim and this dispute is not a core proceeding, and that this claim and this dispute are disputes specifically retained by this Court under its broad base jurisdiction.

The cases cited in our brief, including Lumbard Wall clearly hold for the proposition that this Court's jurisdiction is not restrained and not limited. That if this Court believes that a claim is inextricably intertwined with the administration or consummation of a plan, this Court should keep that claim.

I believe that there is just no case law cited by the Defendants who at least have dropped the charade, and are now in the same boat that stand for contemporary proposition.

I take exception to one conclusion, in the event that this Court determines that this is a core proceeding and I believe the Court should so determine, there is no longer a question as to whether or not a jury trial is necessary, because clearly this Court can try a jury trial even if one is — it would be a procedural matter down the road in a Court proceeding for this Court to determine whether there is a right to a jury trial, and the distinction is drawn between the Defendants, as to whether it's a core or not core issue.

There's one distinction drawn between the Defendants, though, and that is if the Court were to determine this to be a noncore issue, and if the broker Defendants were entitled to a jury trial, then under Pied Piper this Court could not try the case.

However, even if this were to be determined to be a noncore issue, the laws of the State of New York are absolutely clear, the Phoenix Mutual case squarely holds for the proposition that an insurance company's claim sounding in the decision of a policy is equitable in nature.

Let's not lose cite of the fact that this game starts when the insurance company jumped into State Court and brought a declaratory judgment action for rescission of the insurance contract. Clearly, that is an equitable claim. And the Baker and Getty case cited by the Debtor supports the Court's reasoning even if money damages are incidental to a – that does not deprive this Court of the right to a nonjury trial, an equitable nature of the proceeding.

One final word, this matter started on May 8th. There's been no discovery to date. The time for confirmation is rapidly approaching.

THE COURT: You mean consummation.

MR. GINSBURG: Right. None of the Defendants raise any objections to three of the four discovery requests propounded by the Debtor. We'd like to those documents produced immediately. We'd like the insurance company to produce its underwriting file.

THE COURT: Judge Walker –

MR. GINSBURG: Judge Walker said as soon as this Court makes a determination of core or noncore, this Court will determine on how discovery should proceed.

THE COURT: Very well. Therefore you are not saying that they're in default, or that they have not been cooperating with the Debtor, because I read Judge Walker's –

MR. GINSBURG: There's a stay in effect until this Court makes a determination core/noncore. I am saying as a companion to that determination we would ask for discovery to proceed forthwith.

THE COURT: You can reserve your rights if he raises discovery issues.

MR. SURIANO: The Court understands where we're going. If the Court is going to determine today –

THE COURT: The Court will –

MR. SURIANO: – the core/noncore issue. Can I reserve until we have a decision from the Court as to whether we're going to address discovery or other relief.

THE COURT: Very well. Based upon the papers that this Court has read as well as the oral arguments, I think most parties can understand how I came to the Bench this morning. I have not been convinced otherwise.

This Court's mind is still such that this is a core matter. It's core because of the following reasons, under 157(b)(2)(a), that this is a matter that is inextricably intertwined with the administration of the case. And it is because it was an issue that it was a provision under the plan that this case, under which this case was confirmed, that this was going to be a situation where the Debtor was going to maintain insurance on the property.

Furthermore, it deals somewhat, not quite as strong, with 157(b)(2)(1), the reason it doesn't, this Court expressly within the plan of consummation, retained jurisdiction, because of disputes such as this dispute. And that is a phrase that is normally put in the bankruptcy plan of consummaton, this Court is shocked when it is not, it's normally put in, so the Court can go on to substantive consummation and then thereby closing the case, which refers back to the administration of the case.

We do not need these cases lingering. And it's been the history of this Court, that the Court best equipped to handle these issues in an expedited basis is the Court that confirmed the case, that is familiar with the facts and backgrounds of the case, so that time can move on quickly to resolve the issue.

So for this reason, this Court finds that this is a core matter, it is a core matter for the reasons stated, and that other issues can await the District Court's determination as to whether or not it may wish to withdraw the reference, notwithstanding the fact that this Court has determined that it is a core matter.

Now let's talk about discovery, because notwithstanding whether or not the District Court may wish to withdraw the reference, it seems to me that discovery would have to be done in either Court, because I think the options are now this Court or the District Court.

If that is the case, the parties should move quickly with discovery, because this is a matter that possibly affects subsequent consummation. And that being the case, this Court does not wish to see this case come back, as I indicated before, to this Court for a possible consummation, which inures to the detriment of the creditor who voted for this plan, it inures to the detriment of the Debtor and the workers of the Debtor, as well as the tax authorities that enjoy taxes being paid by this Debtor. That is the philosophy of bankruptcy.

It's to get the Debtor back into the main stream of commerce, so that all of those issues can be addressed in an expedited manner. So, therefore, we need now to discuss discovery.

MR. SURIANO: I –

THE COURT: Do you have a copy of the Order that the Debtor supplied to me?

MR. GINSBURG: There was a proposed Order to this Court.

THE COURT: Did you receive a copy of that?

MR. SURIANO: I am not sure which you are referring to.

THE COURT: Give him a copy and supply all the parties with the copy so we can discuss the Order as far as discovery is concerned.

MR. GINSBURG: I have only copy. It was delivered by hand to –

THE COURT: You have just one copy? I have the original here.

MR. GINSBURG: I just have a copy.

MR. SURIANO: Before we get to that, may I make an application?

THE COURT: Certainly.

MR. SURIANO: I have to think a little about what the Court has ruled.

However, I would request and we went through this the last time, that you stay your decision, make effective your decision to such time as we go back to the District Court until we have a resolution of the remaining –

THE COURT: There is no reason for my decision to be stayed. Whether I had ruled today whether it was core or noncore, Judge Walker, his specific instruction was as soon as I made that determination, discovery was to go forward.

I understand that because once I make that determination, then all he has to do is make a decision as to whether or not he is going to revoke the reference.

Once he makes that decision, No matter which decision he may make, discovery will have to be had. So I don't see any need for staying discovery, quite honestly, because one way or the other, discovery will be had in either the District Court or this Court.

MR. SURIANO: There is one other alternative, I agree with what you are saying, I think you have the discretion as a general proposition, and even with whatever Judge Walker said from the Bench to stay or not stay discovery if you want to, and I understand that you don't want to.

THE COURT: I have an open mind. If you can convince me as to the need of –

MR. SURIANO: It could be the other alternative is that the insurance companies right, and we wind up in State Court where we started this action a while ago, if –

THE COURT: You mean you are going to make a motion to that effect?

MR. SURIANO: That is part of the relief.

THE COURT: If you are in State Court, you still have to have discovery.

MR. SURIANO: But it's different.

THE COURT: I understand there are some differences. But basic discovery is basic discovery in State or Federal Court.

MR. SURIANO: I am asking for a stay. If I can not get a stay, as I am not getting one – am I correct? I get the message. In that event, I think – I don't know – I don't remember what the proposed Order said –

MR. GINSBURG: I found another copy of the Order.

MR. SURIANO: Maybe we can share it.

MR. GINSBURG: Here (handing).

THE COURT: A problem with these dates.

MR. GINSBURG: This Order was submitted on June 1st as a proposed Order. I didn't know we had been so delayed coming back to this Court.

THE COURT: You still have a problem with those dates.

MR. GINSBURG: We don't want the documents before the depositions go forward.

THE COURT: Especially with the date of June 14th.

MR. GINSBURG: Perhaps the Court has a problem with the date of June 8th.

THE COURT: Yes. Since we all know I am not going to stay discovery, let's get some realistic dates to be filled in in these Orders.

MR. SURIANO: The date is one factor, the other is the scope of the document demand, which I would like to raise with you.

THE COURT: Do the dates first. Starting in the second paragraph of the Order on Page 2. Those are the dates of June 14th, 16th –

MR. GINSBURG: If I may suggest, we do the dates for the document production first.

THE COURT: Fine. Counsel, how long would it take to produce – first, let's do the scope then, because that is how we're going to be able to determine how long it will take.

MR. SURIANO: We submitted an Affidavit, Judge, from the insurance company, from Richard Wertzberg, claims manager for Star.

And it's in the papers that we submitted to Judge Walker. Here's our problem: We don't have – I will tell you what we don't object to and what is not a problem, we can produce our underwriting file subject to the usual privilege and all of the rules of the Federal Rules of Civil Procedure, that is not a problem.

We can produce whatever correspondence there was between ourselves and Co-Defendant, which I think covers three of the four categories. And I think that is what Mr. Ginsburg was saying before. Our concern goes to the request by the Debtor and to review all insurance policies in the United States covering sprinkler and nonsprinkler buildings.

THE COURT: You are telling me you don't have it categorized?

MR. SURIANO: Right. We have gone and looked and found some, but it's too broad, Judge.

THE COURT: If you found some, can you not produce those some?

MR. SURIANO: Yes.

THE COURT: You have no problem with what you found?

MR. SURIANO: Our problem is a human one. Although people think insurance companies are monoliths, they are not. They function with people too. And we have an insurance company that has a number of managing agents throughout the United States.

Now Mr. Ginsburg on the record when we were before you limited his document request to policies.

There are other types of requests that were originally made, so those are moot. I am just saying policies.

We have looked through our New York office and what was issued. Now I am setting aside the question of territorial relevance, I am talking about compliance.

We objected and I take it you are not going to reverse yourself, the question is compliance. It's physically impossible for us to go around the country and dig these things out, we don't keep it that way.

There is a log which we produced a copy of it which we can do certain things. It's not computer generated, it's basically human memory. They are perfectly entitled to make inquiry at the deposition on this branch, which I think is irrelevant, and —

THE COURT: He has a right to conduct his case as he sees fit.

MR. SURIANO: Let us produce what we've been able to find from our New York office, which I believe is the bulk, but there are other offices yet in the United States, and let that be a starting point. And if he feels he has to make more inquiry, let him supply another document request after the deposition more narrowly focused and we can proceed from there.

THE COURT: That is reasonable.

MR. GINSBURG: We're harking back again to insurance law 3105 which defines a material representation as a misrepresentation.

THE COURT: What has this to do with discovery? He indicated impossibility. And what he has offered is to take what I have and depose the people — let's face it, unfortunately, this issue is not going to be resolved for your drop dead date.

You are going to have to work, and counsel is going to have to work with the bankruptcy counsel, they are going to have to explain — I am not going to put them under that kind of pressure. Let's deal with what he is offering.

MR. GINSBURG: To clarify a previous statement he had me making, I believe the discussion on the record was that if he could not produce the physical documents, the policies which I was less interested in, what I am primarily interested in is any written criteria that would determine whether he binds these types of policies, any rejection of an application because it was a warehouse in Georgia, those types of things.

THE COURT: What he is saying is that type of information is not readily available. And he is not a surgeon, he can give you what he deems is available.

We don't have to believe him, now. We can ask the people that you are going to depose that question and they can come up with that type of information

MR. GINSBURG: If the benefit of proceeding in that manner is that we get everything else expeditiously then I accept the Court's suggestion. And while reserving our rights to disclose procedure on that score, I will proceed that way.

THE COURT: How long will it take that information to be produced, that you say you have?

MR. SURIANO: What we have accumulated by the time that the stay was put in by Judge Walker, we can produce that within two days.

I just want to make sure that the Court understands that we reserve our right to come back and litigate this issue before you, if this case is here, at the appropriate time.

THE COURT: Absolutely. Let me explain to you my policy as far as discovery is concerned.

I would like to see it move forward quickly. Also I would like to have the parties resolve as many issues among themselves as they possibly can.

However, if the parties cannot resolve those issues, they are to contact my chambers and contact my law clerk and have my law clerk schedule the date within twenty-four to forty-eight hours and we'll have a chambers conference and resolve the issues and keep the case moving.

The date you are to produce these documents will be June 20th.

After you have received the documents, how long do you think it's going to take you to review those documents so that you can conduct a meaningful deposition, Mr. Ginsburg?

MR. GINSBURG: Because of certain pre-existing obligations, I would like to schedule the first deposition of the insurance company the following Monday.

MR. HEINEMAN: Since we're going to be asking questions of the insurance company as well, I would like the opportunity to have a little more than six days to go through documents, since I will be wanting to speak with my clients. And I don't know the size of what is going to be produced. I ask the deposition be the latter part of that week or the following week.

MR. SURIANO: I join in that. I suspended depositions in Philadelphia that are ongoing day-to-day to appear before you. I have to get the Metliner to go back. And I am continuing depositions until next Thursday – until the Monday following, I am sorry. That would be the 26th.

I have not yet spoken – my client will be available for deposition, we will make him available. I would like to do it in terms of the deposition either the last part of that week or the following week.

THE COURT: We're talking about the last week in June, then?

MR. GINSBURG: I would like to get one in before the June 30th date.

MS. STEWART: My vacation starts on the 29th.

THE COURT: How about the 27th or 28th?

MR. SURIANO: 28th, June 28th for the insurance company of the State of Pennsylvania.

THE COURT: Right.

Calvin Miller?

MS. STEWART: I am vacation. If we can do it after that period. I am the only one familiar with the case at that point. July 10th, the following Monday, I will make my client available.

THE COURT: July 10th, Calvin Miller.

Kerwick & Curran?

MR. HEINEMAN: We can make our client availability on Wednesday the 12th or 13th.

THE COURT: What date?

MR. GINSBURG: 13th is fine.

MR. SURIANO: The Debtor?

THE COURT: Centainly. Let's pen him in. We will add that as Paragraph 4 of that second –

MR. GINSBURG: Let's make the Debtor July 18th, the following Tuesday.

THE COURT: Very well. July 18th, 10:00 a.m. The Debtor by Mr. Sherman.

MR. HEINEMAN: Yes, Your Honor.

THE COURT: The Debtor by Michael Sherman.

I have added that to Paragraph 4, and I am initialing the changes in Paragraphs 1, 2 and 3, and the insert of Paragraph 4.

I am initialing the changes of June 8th and June 20th. Issued at 11:35 a.m., June 15th and I am signing the Order.

MR. HEINEMAN: I just wanted to address one poin' that I want to make sure that I have clear. At the last conference we indicated to Your Honor we were going to serve document requests on all parties, which we did, the document production that is to take place next Tuesday, that includes the Debtor producing the documents that are demanded of him as well?

MR. HEINEMAN: Clearly –

MR. GINSBURG: The Order that was submitted in the last paragraph on Page 3, that deals again with the demand too which relates to the information that Mr. Suriano agreed to produce to the extent available.

THE COURT: That covers it. Because it says, with all due diligence.

MR. GINSBRUG: Shall identify but not the need to produce, so that needs to be modified – and shall be required to produce such documents as they are already obtained or something.

THE COURT: All right. Strike the words "but shall not be required to produce such documents pending further remember Order of this Court" and add, "and shall produce those documents obtained." I am I initialing that.

MR. SURIANO: I want to make sure that everyone understands that what I said before in terms of considering our rights and remedies as a result of what happens today, we might very well go back, there is no surprise, we might go back to Judge — to the District Court and ask for a stay.

THE COURT: Certainly. That is — even if it is a surprise, so what?

MR. SURIANO: I feel I should say certain things to the Court and to Counsel.

THE COURT: I anticipate you are going to represent your clients in the best manner possible and if asking for a stay is one of those things you have to do, you have to do it.

This Court does not feel animosity towards the attorney that is vigorously representing his clients, as long as he does that within the rules, and I believe that is within the rules.

MR. SURIANO: Thank you, Your Honor.

CERTIFICATE

I, Theresa Glabik, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That I reported the proceedings hereinbefore set forth and that the foregoing is a true record of the proceedings herein.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

/s/Theresa Glabik

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

In re:

	Case Nos.
BEN COOPER, INC.	88 B 10484
LIGHT MANUFACTURING CO., INC.,	88 B 10547
AIMWELL PRODUCTS, INC.	88 B 10546
BEN COOPER SALES CORP.,	88 B 10770

Debtors.
----------X

BEN COOPER, INC.,

Plaintiff,

Assigned to: Hon. Louis L. Stanton

– against –

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

NOTICE OF CROSS-MOTION

Defendants.

Misc. No. M-47
----------X

PLEASE TAKE NOTICE, that upon the affidavit of Geoffrey W. Heineman, the exhibits annexed thereto, and upon the accompanying memorandum of law, the undersigned will cross-move this Court on behalf of defendant Kerwick & Curran, Inc., before the Honorable Louis L. Stanton, United States District Judge, at the United States Courthouse, Room 410, Foley Square, New York, New York on the 11th day of July, 1989, at 10:00 o'clock in the forenoon or soon thereafter as counsel can be heard for an order: (1) granting defendant Kerwick & Curran, Inc. leave to appeal pursuant to 28 U.S.C. section 158(a) the June 15, 1989 order of the Bankruptcy Court; (2) reversing the Bankruptcy Court's determination that this adversary proceeding is core pursuant to 28 U.S.C. section 157(b)(2)(A) and (L); (3) establishing defendant Kerwick & Curran, Inc.'s right to a jury trial in the adjudication of this controversy; (4) withdrawing reference of

the adversary proceeding commenced by Debtor Ben Cooper, Inc. against the defendants including Kerwick & Curran, Inc. from the Bankruptcy Court pursuant to 28 U.S.C. section 157(d), thereby vacating the June 15, 1989 order issued by the Bankruptcy Court below; and (5) determining that this Court should abstain pursuant to 28 U.S.C. section 1334(c) from hearing the adversary proceeding; and for such other relief as may be just and proper.

Dated: New York, New York
June 26, 1989

Respectfully submitted,

OHRENSTEIN & BROWN

By: /s/ Geoffrey W. Heineman
Geoffrey W. Heineman
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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In re:

	Case Nos.
BEN COOPER, INC.	88 B 10484
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Debtors.
----------X

BEN COOPER, INC.,

Plaintiff,

— against —

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Defendants.
----------X

Assigned to: Hon. Louis L. Stanton

AFFIDAVIT

STATE OF NEW YORK)
:ss.
COUNTY OF NEW YORK)

GEOFFREY W. HEINEMAN, being duly sworn, deposes and says:

1. I am associated with the law firm of Ohrenstein & Brown, attorneys for defendant Kerwick & Curran, Inc. ("KC") in the captioned adversary proceeding and as such, I am fully familiar with the facts and circumstances herein.

2. I submit this affidavit in support of the cross-motion of defendant KC for an order: (i) granting KC leave to appeal pursuant to 28 U.S.C. Section 158(a) from the June 15, 1989 order of the Hon. Cornelius Blackshear; (ii) reversing the Bankruptcy Court's determination that this adversary proceeding is core pursuant to 28 U.S.C. Sections 157(b)(2)(A) and (L); (iii) establishing KC's right to a jury trial in the adjudication of this controversy; (iv) withdrawing the reference of the adversary

proceeding commenced by Debtor against the defendants (including KC) from the Bankruptcy Court pursuant to 28 U.S.C. Section 157(d), thereby vacating the June 15, 1989 order issued by the Bankruptcy Court below; and (v) determining that this Court will abstain pursuant to 28 U.S.C. Section 1334(c) from hearing the adversary proceeding.

3. In April, 1988, the Debtor, Ben Cooper, Inc. ("Debtor") filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

4. Thereafter Debtor continued to operate pursuant to Sections 1107 and 1108 of the Bankruptcy Code and in connection with those operations, Michael Sherman was appointed by the Bankruptcy Court to act as "Chief Executive Officer."

5. On or about September 30, 1988, Debtor sought and obtained a property and casualty policy (the "Policy") from defendant The Insurance Company of the State of Pennsylvania ("ICSP"). In attempting to obtain the Policy, Debtor contacted defendant Kalvin-Miller International, Inc. ("KM") who in turn contacted KC, an intermediary broker to assist in placement of the insurance coverage.

6. On January 6, 1989, Debtor allegedly sustained a fire at its manufacturing facilities in Rossville, Georgia. As a result of the fire, on or about April 13, 1989 Debtor submitted proofs of loss to ICSP purporting to demonstrate damages of $699,199.64 and business interruption losses of $1,490,580.00.

7. On April 19, 1989, ICSP commenced a declaratory judgment action in the New York State Supreme Court, County of New York against Debtor seeking to void *ab initio* the Policy issued to Debtor on the grounds that it was procured by material misrepresentations. (The complaint does not make clear the substance of the alleged misrepresentations). In addition to attempting to void the Policy, ICSP also sought a declaration that the proofs of loss purporting to demonstrate the approximate $2 million loss allegedly sustained by Debtor were based upon misstatements and were exaggerated as to the extent and value of the damages sustained.

8. On May 9, 1989, Debtor filed its adversary complaint against ICSP, KM and KC alleging that such proceeding was a core proceeding pursuant to 28 U.S.C. Section 157 (the "adversary proceeding"). By that complaint, Debtor seeks *inter alia*: (i) a declaration that the Policy provided by ICSP is valid and enforceable and provides coverage to Debtor for the alleged fire loss sustained on January 6, 1989; (ii) in excess of $2 million in compensatory damages together with punitive damages against ICSP, which damages are claimed by Debtor to constitute property of the estate which ICSP is required to turn over. In the alternative, the complaint alleges, *inter alia*, that if the Policy is not valid and does not provide coverage for the alleged fire losses, then the failure of such coverage to have been obtained will be a result of the negligence of defendants KM and/or KC. Accordingly, damages in excess of $2 million are sought under those circumstances from defendants KM and/or KC. (A copy of the adversary complaint is annexed hereto as Exhibit "A").

9. Simultaneously, with the filing of the adversary proceeding, Debtor also moved by order to show cause for a preliminary injunction enjoining ICSP: (i) from prosecuting the action commenced on or about April 19, 1989, in the Supreme Court of the State of New York; (ii) from terminating the Debtor's insurance policy issued effective October 1, 1988 – "including the provision of coverage for manufacturing facilities of Debtor and its affiliates." As part of its application to the Bankruptcy Court, Debtor also sought an order directing expedited discovery in the adversary proceeding.

10. On May 17, 1989, all parties appeared before the Honorable Cornelius Blackshear of the United States Bankruptcy Court and following oral argument, an injunction was issued precluding ICSP from prosecution of the state court action and termination of Debtor's Policy. In addition, Judge Blackshear directed accelerated discovery in the adversary proceeding. An order encompassing that ruling was subsequently signed by Judge Blackshear on May 27, 1989. (Copies of the transcript of that hearing and the May 24, 1989 order are annexed hereto as Exhibits "B" and "C", respectively).

11. Upon notice to counsel for all parties, ICSP filed an order to show cause seeking relief from the May 24, 1989 order in the United States District Court for the Southern District of New York on May 26, 1989. On May 30, 1989, defendant KC joined that aspect of ICSP's motion to the District Court that sought withdrawal of the reference by filing a cross-motion and supporting memoranda.

12. On May 31, 1989, the Honorable John M. Walker, U.S.D.J., heard oral argument on ICSP's motion to the District Court. Judge Walker declined to reach any of the requests of ICSP or KC until the Bankruptcy Court determined one threshold issue, namely whether this adversary proceeding was core or non-core pursuant to 28 U.S.C. Section 157(b). Accordingly, Judge Walker stayed all discovery requests under the May 24, 1989 order pending the Bankruptcy Court's specific determination of the core/non-core issue. Judge Walker remanded the matter back to Judge Blackshear to make such a determination and stated that the right to pursue an appeal in the District Court from the Bankruptcy Court for all parties would remain inviolate.

13. Following the scheduling by the Bankruptcy Court of a hearing on this issue for June 15, 1989, defendant KC submitted a supplemental brief in support of a determination that the action was a non-core proceeding. Counsel for Debtor, Ben Cooper, Inc. submitted two letters on June 13 and June 14, 1989, and ICSP submitted a further supplemental brief on June 14, 1989.

14. On June 15, 1989, the Honorable Cornelius Blackshear U.S.B.J. heard oral argument from counsel for all parties. (A copy of the transcript of the June 15, 1989 hearing is annexed hereto as Exhibit "D"). Judge Blackshear after argument rendered an opinion from the bench finding the adversary proceeding to be core pursuant to 28 U.S.C. Sections 157(b)(2)(A) and (L). Judge Blackshear also ordered discovery calling for the production of documents by all parties on June 20, 1989, and for the depositions to be taken on June 28, July 10, July 13, and July 18, 1989, of ICSP, KM, KC, and Debtor, respectively. (A copy of the June 15, 1989 order is annexed hereto as Exhibit "E").

15. As is more fully set forth in the accompanying memorandum of law, contrary to the Bankruptcy Court's June 15, 1989

finding, the adversary proceeding is not a core proceeding as the claims not only fail to fall within any of the enunciated definitions of such a proceeding, but further, the negligence cause of action involves solely state law questions which require neither the application nor construction of the bankruptcy law.

16. Instead the matter is a non core related proceeding to which the defendant KC is entitled to a trial by jury. Accordingly, since the Bankruptcy Court cannot render a final determination over the issues involved nor can it provide KC with a jury trial as demanded, sufficient cause under 28 U.S.C. Section 157(d) exists for the matter to be withdrawn from the Bankruptcy Court.

WHEREFORE, it is respectfully requested that this Court issue an order: (i) granting KC leave to appeal pursuant to 28 U.S.C. Section 158(a) from the June 15, 1989 order of the Honorable Cornelius Blackshear; (ii) reversing the Bankruptcy Court's determination that this adversary proceeding is a core pursuant to 28 U.S.C. Sections 157(b)(2)(A) and (L); (iii) establishing KC's right to a jury trial in the adjudication of this controversy; (iv) withdrawing the reference of the adversary proceeding commenced by Debtor against defendants from the Bankruptcy Court pursuant to 28 U.S.C. Section 157(d), thereby vacating the June 15, 1989 order issued by the Bankruptcy Court below; and (v) determining that this Court will abstain pursuant to 28 U.S.C. Section 1334(c) from hearing the adversary proceeding.

/s/ Geoffrey W. Heineman

Geoffrey W. Heineman

Sworn to before me this
23rd day of June, 1989

/s/ Jeannette Castillo

NOTARY PUBLIC

JEANNETTE CASTILLO
Notary Public, State of New York
No. 03-4898273
Qualified in Bronx County
Commission Expires Jan 5, 1991

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

In re:

	Case Nos.:
BEN COOPER, INC.,	88 B 10484
LIGHT MANUFACTURING CO., INC.,	88 B 10547
AIMWELL PRODUCTS, INC.,	88 B 10546
BEN COOPER SALES CORP.,	88 B 10770

Debtors.

---------- X

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Defendants.

---------- X

Assigned to Hon. Cornelius Blackshear

Adv. Pro. No. 89-5685A

SUMMONS AND NOTICE OF PRE-TRIAL

YOU ARE SUMMONED and required to submit a motion or answer to the complaint which is attached to this summons to the clerk of the bankruptcy court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall submit a motion or answer to the complaint within 35 days.

Address of the Clerk:

Clerk of the United States
Bankruptcy Court
Southern District of New York
1 Bowling Green
U.S. Custom House
Room 614
New York, New York 10004

At the same time, you must also serve a copy of the motion or answer upon plaintiff's attorney.

Name and Address of Plaintiff's Attorney:

Lowenthal, Landau, Fischer & Ziegler, P.C.
250 Park Avenue
New York, New York 10177

If you make a motion, your time to answer is governed by Bankruptcy Rule 7012.

YOU ARE NOTIFIED that a trial of proceeding commenced by the filing of the complaint will be held at the following time and place:

Address:

United States Bankruptcy Court
Room: 610-2
Southern District of New York
United States Custom House
1 Bowling Green
New York, New York 10004
Date and Time: June 15, 1989 at 10:00 A.M.

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

/s/C. Lewis
Clerk of the Bankruptcy Court

By: /s/Dickson
Deputy Clerk

May 9, 1989
Date

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos.:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Assigned to
Hon. Cornelius
Blackshear

Adv. Pro.
No. 89-5686-A

COMPLAINT

Plaintiff Ben Cooper, Inc., by its attorneys, Lowenthal, Landau, Fischer & Ziegler, P.C., for its complaint, alleges:

1. This action arises under 28 U.S.C. §1334 and 28 U.S.C. §§2201 and 2202 as more fully set forth herein.

2. This is an action for a declaratory judgment for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears, and for related monetary damages.

3. Plaintiff is a corporation duly organized and existing under the laws of the State of New York.

4. Upon information and belief, defendant The Insurance Company of the State of Pennsylvania ("ICPA") is a corporation organized and existing under the laws of the state of Pennsylvania and is authorized to conduct business in the state of New York.

5. Upon information and belief, defendant Kalvin-Miller International, Inc. ("Kalvin-Miller") is a corporation organized and existing under the laws of the state of New York and is authorized to conduct business in the state of New York.

6. Upon information and belief, defendant Kerwick & Curran, Inc. ("Kerwick & Curran") is a corporation organized and existing under the laws of the state of New York and is authorized to conduct business in the state of New York.

FIRST COUNT AGAINST ICPA

7. Prior to October 1988 through April 4, 1989, plaintiff conducted business as a debtor and debtor-in-possession under the jurisdiction of this Court.

8. On April 4, 1989, this Court entered an Order of Confirmation confirming plaintiff's Plan of Reorganization.

9. Plaintiff's Plan of Reorganization (i) compels the debtor/plaintiff to maintain insurance coverage of its business premises throughout consummation of the Plan of Reorganization, and (ii) retains jurisdiction of this Court to hear all disputes arising prior to the Order of Confirmation or relating to the consummation or implementation of the Plan of Reorganization.

10. In or about July, 1988, plaintiff consulted with Kerwick & Curran in order to review its insurance needs and to obtain insurance coverage for its business operations and facilities.

11. Thereafter, Kerwick & Curran referred plaintiff to Kalvin-Miller in order to review its insurance needs and to obtain insurance coverage for its business operations and facilities.

12. On or about October 1, 1988, defendant ICPA, its agents and/or representatives, Kalvin-Miller and Kerwick & Curran, in consideration of a premium of $57,000, which was paid, issued a "binder" insurance policy (dated October 4, 1988), insuring the property of the plaintiff (and a subsidiary and/or affiliate, Galiday), against loss, expense, and business interruption (the "Policy").

13. By its terms, the Policy was effective from October 1, 1988 through October 1, 1989. A copy of the Policy is annexed as Exhibit A.

14. The Policy insured plaintiff against "all risk."

15. On or about January 6, 1989, while the Policy was in full force and effect, plaintiff sustained a fire loss at one of its premises (Bailey Avenue and Peerless Street, Rossville, Georgia), which premises and loss were covered by the Policy.

16. As a result of the fire, plaintiff sustained damages, which, upon information and belief, will exceed the sum of $2,000,000.

17. Plaintiff's claim arose on January 6, 1989 – the date of the fire loss.

18. Defendants were fully apprised of the dimensions of the fire loss prior to April 4, 1989; however, notwithstanding such advice, ICPA refused to acknowledge its liability under the Policy.

19. On or about April 18, 1989, defendant ICPA commenced an action against plaintiff in the Supreme Court of the State of New York, County of New York, seeking, *inter alia*, a determination that the Policy was void from the date of its inception and that it had no liability to plaintiff.

20. Plaintiff has fully complied with all the terms and conditions of the Policy.

21. Such purported cancellation is wholly without justification and constitutes willful, wanton and malicious conduct on the part of ICPA.

22. By reason of the foregoing, plaintiff is entitled to a judgment declaring that: (i) the Policy is still in full force and effect, including coverage of plaintiff's manufacturing facilities, binding both plaintiff and ICPA, and thus, ICPA is liable for plaintiff's loss under the Policy, and (ii) that plaintiff has been damaged in a sum to be determined by this Court which, upon information and belief, will exceed the sum of $2,000,000.

23. By further reason of the foregoing, plaintiff is entitled to recover punitive damages from ICPA in the sum of $5,000,000.

SECOND COUNT AGAINST KALVIN-MILLER

24. Plaintiff repeats the allegations of paragraphs 1 through 23 of this complaint.

25. In or about July, 1988, plaintiff retained Kalvin-Miller to act as insurance agent to plaintiff and instructed Kalvin-Miller to procure suitable insurance protection for plaintiff's businesses and facilities.

26. Kalvin-Miller was obligated to use skill, care and diligence to procure suitable insurance protection for plaintiff.

27. Plaintiff relied on the skill and expertise of Kalvin-Miller in obtaining the Policy.

28. Plaintiff provided Kalvin-Miller with all necessary and relevant information of its business operations and facilities – including the fact that its business included manufacturing operations.

29. On or about July, 1988, Kalvin-Miller became the broker of record for plaintiff's insurance policies.

30. In or about September, 1988, plaintiff paid Kalvin-Miller $57,000 in full payment of the premiums due for the Policy.

31. Plaintiff has asserted an insurance claim based on the fire loss suffered on January 6, 1989.

32. ICPA has wrongfully dishonored plaintiff's claim – asserting that the Policy was void from its inception due to a failure to disclose information that plaintiff had provided to Kalvin-Miller.

33. If the Policy does not provide coverage for plaintiff's fire loss, then Kalvin-Miller failed to use the necessary skill, care and diligence to obtain insurance for plaintiff and was thus negligent.

34. By reason of the foregoing, if ICPA does not provide coverage to plaintiff under the Policy, Kalvin-Miller is liable to plaintiff in the amount of the fire loss and for any other damage sustained by plaintiff as a result of such lack of coverage.

THIRD COUNT AGAINST KERWICK & CURRAN

35. Plaintiff repeats the allegations of paragraphs 1 through 34 of this complaint.

36. In order to obtain the Policy, plaintiff consulted with defendant Kerwick & Curran and advised Kerwick & Curran of the nature of its operations – including its manufacturing facilities.

37. The Policy provided that it was "bound" by Kerwick & Curran.

38. In "binding" the Policy, Kerwick & Curran was required to use the necessary and customary skill, care and diligence of an insurance agent.

39. Plaintiff relied on the skill, expertise and authority of Kerwick & Curran in obtaining the Policy and in binding ICPA thereto.

40. If the Policy does not provide coverage for plaintiff's loss, then Kerwick & Curran failed to use the necessary skill, care and diligence in obtaining and "binding" the Policy and was thus negligent.

41. By reason of the foregoing, if the Policy does not provide coverage to plaintiff for its fire loss or otherwise, Kerwick & Curran is liable to plaintiff in the amount of such fire loss and other consequential damages which plaintiff may sustain.

WHEREFORE, plaintiff demands judgment:

On the First Count against ICPA, declaring:

(1) that the Policy issued to it by ICPA remains in full force and effect, including coverage of plaintiff's manufacturing facilities;

(2) that ICPA is permanently enjoined from terminating the Policy;

(3) that ICPA is liable to plaintiff under the terms of the Policy in an amount to be determined by this Court which is, upon information and belief, in excess of $2,000,000; and

(4) that plaintiff is entitled to recover punitive damages of $5,000,000;

On the Second Count against Kalvin-Miller declaring that, if ICPA is not liable under the Policy, Kalvin-Miller is liable to plaintiff in the amount of the loss sustained by plaintiff which would have been covered thereunder;

On the Third Count against Kerwick & Curran declaring that, if ICPA is not liable under the Policy, Kerwick & Curran is liable to plaintiff in the amount of the loss sustained by plaintiff which would have been covered thereunder;

On all counts, awarding plaintiff such other and further relief as to this Court seems just and proper.

Dated: May 8, 1989

LOWENTHAL, LANDAU, FISCHER & ZIEGLER, P.C.

By: s/

Lawrence L. Ginsburg
250 Park Avenue
New York, New York 10177
Attorneys for plaintiff
Ben Cooper, Inc.

UNITED STATES BANKRUPTCY
COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

In re:

	Case Nos.
BEN COOPER, INC.,	88 B 10484
LIGHT MANUFACTURING CO., INC.,	88 B 10547
AIMWELL PRODUCTS, INC.,	88 B 10546
BEN COOPER SALES CORP.,	88 B 10770

Debtors.
----------X

BEN COOPER, INC.,

Plaintiff,

– against –

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
----------X

Assigned to:
Hon. Cornelius Blackshear

Adv. Pro No.
89-5685A

ANSWER

Defendant Insurance Company of the State of Pennsylvania Demands A Trial By Jury On All Issues

Defendant, The Insurance Company of the State of Pennsylvania ("State of Penn"), by its attorneys, Mound, Cotton & Wollan, answering the complaint, alleges:

1. Denies the allegations in paragraph 1.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 2, 3, 5, and 6.

3. Admits the allegations in paragraph 4.

ANSWERING THE FIRST COUNT

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 8 and 9, except begs leave to refer to the Order of Confirmation and Plan of Reorganization referred to therein for their content.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 10 and 11.

7. Denies the allegations contained in paragraphs 12, 13, and 14, except admits that in consideration of payment of a premium and based upon certain representations made and information submitted to it by plaintiff's authorized representatives, defendants Kerwick & Curran, Inc. and Kalvin-Miller International, Inc., State of Penn issued a policy of insurance effective October 1, 1988 bearing number 404 08 22 (hereinafter the "Policy"), and begs leave to refer to the original of the Policy for its terms and conditions.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 15 and 16, except specifically denies that the Policy was in full force and effect at the time of the alleged loss or that there was coverage.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17.

10. Denies the allegations contained in paragraph 18, except admits that it did not accept liability and specifically avers that it has no liability to plaintiff.

11. Admits the allegations in paragraph 19, and begs leave to refer to the complaint in the action pending in the Supreme Court of the State of New York, County of New York entitled, *The Insurance Company of the State of Pennsylvania v. Ben Cooper, Inc.* for its content.

12. Denies the allegations contained in paragraphs 20, 21, 22, and 23.

ANSWERING THE SECOND COUNT

13. Except as hereinbefore admitted or otherwise pleaded to, denies the allegations in paragraph 24.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 25, 26, 27, 28, 30, 33, and 34.

15. Admits the allegations in paragraph 29.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31, except admits that plaintiff purports to have presented a claim under the Policy for an alleged January 6, 1989 loss at its Rossville, Georgia premises.

17. Denies the allegations contained in paragraph 32.

ANSWERING THE THIRD COURT

18. Except as hereinbefore admitted or otherwise pleaded to, denies the allegations in paragraph 35.

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 36, 38, 39, 40, and 41, except denies that the acts of Kerwick & Curran, Inc. can bind State of Penn.

20. Denies the allegations contained in paragraph 37.

FOR A FIRST AFFIRMATIVE DEFENSE

21. This Court lacks subject matter jurisdiction over the matters set forth in the complaint, and, as a consequence thereof, the complaint should be dismissed.

FOR A SECOND AFFIRMATIVE DEFENSE

22. The complaint fails to state a claim for punitive damages.

FOR A THIRD AFFIRMATIVE DEFENSE

23. Prior to October 1, 1988, plaintiff, through its authorized representatives, made certain representations and submitted certain information to State of Penn in connection with plaintiff's request for insurance to cover various properties located in New York and elsewhere.

24. The representations made and the information submitted to State of Penn by plaintiff's authorized representatives included details concerning locations to be insured, the nature of the properties to be insured, and the nature of plaintiff's operations at each location.

25. Based upon the information and representations aforesaid, State of Penn issued the Policy subject to certain limits and other conditions, providing coverage with respect to the various locations for which plaintiff requested coverage.

26. Upon information and belief, the information and representations submitted by plaintiff's representatives were false and misleading in that, *inter alia*, the description of plaintiff's business operation was described as that of an importer and wholesaler of Halloween costumes and accessories whereas plaintiff's operations included manufacturing of merchandise. The information was further false and misleading in that the description of the locations to be insured did not accurately describe the building structures at such locations and the operations conducted therein.

27. This false and misleading information constituted a misrepresentation of material facts upon which State of Penn relied in issuing the Policy.

28. By reason of the foregoing, the Policy is void from inception thereby entitling defendant to a declaration that it has no liability under the Policy.

FOR A FOURTH AFFIRMATIVE DEFENSE

29. Defendant repeats and realleges the allegations set forth in paragraphs 23 through 28 as though fully set forth at length herein.

30. By reason of the Policy being void from inception, State of Penn is not liable to plaintiff for its alleged January 6, 1989 fire loss.

FOR A FIFTH AFFIRMATIVE DEFENSE

31. Upon information and belief, the documentation and information submitted by plaintiff and/or its authorized representatives in support of its claim for loss arising from a January 6, 1989 fire at its Rossville, Georgia premises contained false and misleading statements as to, *inter alia*, the extent of the alleged loss, the value of the property allegedly damaged or lost, and the nature of the property allegedly damaged or lost.

32. These false and misleading statements constitute a breach of the Policy by its express terms and as a matter of law.

33. By reason of the foregoing, State of Penn is not liable to plaintiff for the alleged January 6, 1989 loss.

WHEREFORE, The Insurance Company of the State of Pennsylvania demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Dated: New York, New York
June 8, 1989

MOUND, COTTON & WOLLAN
BY: /s/ Philip C. Silverberg
Philip C. Silverberg
Attorneys for Defendant
The Insurance Company of the
State of Pennsylvania
125 Maiden Lane
New York, New York 10038
(212) 804-4200

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

	Case Nos.:
BEN COOPER, INC.,	88 B 10484 (CB)
LIGHT MANUFACTURING CO., INC.,	88 B 10547 (CB)
AIMWELL PRODUCTS, INC.,	88 B 10546 (CB)
BEN COOPER SALES CORP.,	88 B 10770 (CB)

Debtors.
---------- X

AMENDED CONSOLIDATED PLAN OF REORGANIZATION

BEN COOPER, INC. ("BEN COOPER"), LIGHT MANUFACTURING CO., INC. ("LIGHT"), AIMWELL PRODUCTS, INC. ("AIMWELL"), and BEN COOPER SALES CORP. ("COOPER SALES"), DEBTORS in the above captioned Chapter 11 cases (hereinafter referred to by name or as "DEBTORS"), hereby propose the following Amended Consolidated Plan of Reorganization, pursuant to Chapter 11 of Title 11, United States Code.

ARTICLE I

DEFINITIONS

The following terms, when used in the Plan of Reorganization, shall, unless the context otherwise requires, have the following meanings, respectively:

1.1 Administrative Claims: Claims accruing after the date the Chapter 11 cases commenced, including the fees and expenses of professional persons, as defined in Sections 503 (b) and 507 (a) (1) of the Code.

1.2 "Allowed" (a) when modifying the term Claim, Priority Claim, Tax Claim or Unsecured Claim, shall mean a claim (i) as to which a timely proof of claim has been filed or is deemed to have been filed under Section 1111(a) of the Code and (ii) as to which no timely objection has been made, or which has

been allowed by a Final Order; (b) when modifying the term Administrative Claim, shall mean an Administrative Claim as to which no objection has been made or which has been allowed as such by a Final order; or (c) when modifying the term Fee Claim, shall mean a Fee Claim that has been allowed as such by a Final Order.

1.3 Cash Fund: A segregated account to be established on or before January 31, 1989, in an amount equal to 65% of General Unsecured Claims, for the sole benefit of General Unsecured Creditors and the funds on deposit therein, will be used for no purpose other than in satisfaction of the initial distribution under the Plan. If the Plan is not confirmed, then the Funds will be returned to the DEBTORS.

1.4 Chapter 11: The proceedings commenced by the DEBTORS' Petitions for Reorganization under Chapter 11 of the Code bearing Case Numbers 88 B 10484 (CB), 88 B 10546 (CB), 88 B 10547 (CB) and 88 B 10770 (CB).

1.5 Claim: Claim means: (a) a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or (b) a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, secured or unsecured.

1.6 Code: The Bankruptcy Code, 11 U.S.C. Sections 1101 *et seq.*, as now or hereafter in effect.

1.7 Confirmation Date: The date of the entry of the Confirmation Order by the Bankruptcy Court confirming the Plan.

1.8 Confirmation Order: The order entered by the Bankruptcy Court confirming the Plan in accordance with the provisions of the Code.

1.9 Consummation Date: Ten business days following the Confirmation Date (but if such day is not a business day, then the

following business day) provided that no order staying Confirmation or consummation of the Plan has been entered prior thereto which is still in effect on such date. If an order staying consummation or Confirmation of the Plan has been entered, then Consummation Date shall mean the earlier of the first business day following the date upon which (a) the Confirmation Order has become a Final Order, or (b) any stay of consummation of the Plan is no longer effective, provided that such latter date is more than one day after the Confirmation Date.

1.10 Court: The United States Bankruptcy Court for the Southern District of New York having jurisdiction in this case.

1.11 Creditor: Person or entity that has a claim against the DEBTORS that arose on or before the Petition Date or Claim against the DEBTORS' estate of any kind specified in §502(g), §502(h), or 502(i) of the Bankruptcy Code.

1.12 Debtors: BEN COOPER, INC., a New York Corporation, LIGHT MANUFACTURING CO., INC., a New York Corporation, AIMWELL PRODUCTS, INC., a New York Corporation, and BEN COOPER SALES CORP., a New York Corporation.

1.13 Disputed Claims Escrow Account: Account established and maintained by DEBTORS in such amount as would be required to be paid on Consummation Date in respect of any Claim which is not an allowed Claim.

1.14 Estate: The total property of whatever kind that is owned by the DEBTORS.

1.15 Executory Contracts: Those contracts which have not expired prior to the filing of the Petitions.

1.16 Fee Claim: Shall mean a claim governed by Section 330 of the Code, subject to allowance under Section 503 of the Code, and subject to priority under Section 507(a)(1) of the Code.

1.17 Final Order: An order of the Bankruptcy Court (i) which is not the subject of an appeal, or (ii) which shall not

have been reversed, stayed, modified or amended, or (iii) from which the time to appeal, seek review, certiorari or rehearing of such order shall have become final in accordance with Rule 8002 of the Bankruptcy Rules.

1.18 General Unsecured Claim: An Unsecured Claim or Claims against the DEBTORS that is not entitled to priority pursuant to the Code.

1.19 Guarantors: Those individuals who guaranteed the Post-Petition Financing from The First Women's Bank to the DEBTORS', specifically, Ira D. Cooper and Robert Cooper.

1.20 Impaired: The legal, equitable and contractual alteration of one's rights to which a Claim or Interest attaches failure to cure any contractual default and compensate for any damages incurred as a result of the default, or the holder of a Claim or Interest will not receive cash equal to the Allowed Amount of such Claim or the greater of any fixed liquidation preference or redemption price which the holder of such Interest is entitled to receive.

1.21 Interests: The rights of owners and holders of the issued and outstanding shares of common stock or other equity securities of the DEBTORS.

1.22 Petitions: The Voluntary Petition filed by BEN COOPER pursuant to Chapter 11 of the Code, on March 8, 1988, a Voluntary Petition filed by LIGHT pursuant to the Chapter 11 of the Code, on March 15, 1988, a Voluntary Petition filed by AIMWELL pursuant to Chapter 11 of the Code, on March 15, 1988, and a Voluntary Petition filed by COOPER SALES pursuant to Chapter 11 of the Code, on April 8, 1988.

1.23 Plan: This Consolidated Chapter 11 Plan of Reorganization and any amendment thereto or modification thereof.

1.24 Priority Claim: Any Allowed Claim, other than an Administrative Claim and Tax Claim, to the extent entitled to priority in payment under Section 507 (a) of the Code.

1.25 Reorganization Cases: The case for the Reorganization of BEN COOPER commenced by Voluntary Petition under Chapter 11 on March 8, 1988, a Voluntary Petition filed by LIGHT pursuant to Chapter 11 of the Code, on March 15, 1988, a Voluntary Petition filed by AIMWELL pursuant to Chapter 11 of the Code, on March 15, 1988, and a Voluntary Petition filed by COOPER SALES pursuant to Chapter 11 of the Code, on April 8, 1988.

1.26 Reorganized DEBTOR: BEN COOPER, INC., subsequent to the Consummation Date.

1.27 Secured Claim: Any Claim collateralized by a lien or encumbrance on property in which the DEBTORS have an interest, to the extent of the value of the property.

1.28 Tax Claim: Any Claim or portion thereof against any of the DEBTORS subject to priority under Section 507(a)(7) of the Code.

1.29 The First Women's Bank: The DEBTORS' Post-Petition and Post Confirmation Financing Institution.

ARTICLE II

Substantive Consolidation

2.1 The DEBTORS submitted a Motion for Substantive and Procedural Consolidation of their respective cases. All Claims, Fee Claims and Administrative Claims against each of the DEBTORS shall be treated as Claims, Fee Claims and Administrative Claims against the Estate. Any Claim, Fee Claim or Administrative Claim against any DEBTOR that is also asserted against any other DEBTOR, on any basis, (including, without limitation, as a Co-Debtor, Guarantor, surety or joint tortfeasor) shall be treated as a single Claim, Fee Claim or Administrative Claim against the Estate. No Claim, Fee Claim or Administrative Claim of a DEBTOR against any other DEBTOR shall be allowed for purposes of this Plan and no distribution shall be made under this Plan on account of such a Claim or Administrative Claim. The Court granted the DEBTORS' Motion on January 31, 1989.

ARTICLE III

Administrative, Fee and Tax Claim

3.1 All Allowed Administrative Claims shall be paid by the DEBTORS out of the credit balance at The First Women's Bank on the Consummation Date or such other date as may be mutually agreed upon.

3.2 Unless otherwise agreed by the holder of an Allowed Fee Claim, (a) all Allowed Fee Claims for services through Consummation Date shall be paid out of the credit balance at the First Women's Bank on the Consummation Date; and (b) all reasonable Fee Claims for services after the Consummation Date by the DEBTORS' counsel, counsel to the Creditor's Committee, DEBTORS' accountants and Creditors' Committee accountants shall be paid upon rendition of bills sent to the DEBTOR and the Creditor's Committee. If neither the Creditor's Committee or the reorganized DEBTOR has objected to any such bill on or before a date that is twenty days after submission of such bill to the Creditor's committee and the DEBTOR, the DEBTOR shall pay such fees and expenses in the amounts requested. If objection is made to the amount of any fees or expenses of any professional, and such objection shall not be resolved by agreement between such professional, the Creditors' Committee and the DEBTOR, the controversy shall be submitted to the Court to which an application for compensation shall be made by the respective professional.

3.3 Unless otherwise agreed by the holder of an Allowed Tax Claim, all Allowed Tax Claims shall be paid out of the Cash Fund on the Consummation Date. However, the DEBTORS may elect to defer payments of the Allowed Tax Claims pursuant to the applicable provisions of the Code.

ARTICLE IV

CLASSIFICATION OF CLAIMS AND INTERESTS

4.1 Class 1 Claims – Shall consist of all General Unsecured Claims that are not included in Classes 2 hereof.

4.2 Class 2 Claims – Claims shall consist of all General Unsecured Claims that are less than or equal to $1,000.00 Any Class 1 Creditor may elect to become a Class 2 Creditor by reducing its claim to $1,000.00.

4.3 Class 3 Interests – Shall consist of all interests of equity security holders of the DEBTORS.

ARTICLE V

TREATMENT OF IMPAIRED CLASS UNDER THE PLAN

5.1 Class 1 – Class 1 Creditors are Impaired, and the holders thereof shall receive a distribution equal to one hundred (100%) percent of the Allowed amount of their respective Claims pursuant to provisions of the Code, in full settlement, release and discharge thereof, payable as follows: Sixty-five (65%) in cash on the Consummation Date, or as soon thereafter as is practicable, from the Cash Fund. If confirmation is delayed until a date after January 31, 1989, the DEBTORS will escrow the funds required on the Consummation Date on January 31, 1989 in an interest-bearing escrow account, to be deposited in either a money market account, a certificate of deposit, savings certificate or the equivalent, earning the prevailing rate of interest, at the First Women's Bank. The principal and interest will be distributed to the CREDITORS on the consummation date; and thirty-five (35%) percent by June 30, 1989, with interest at prime on the thirty-five (35%) percent, from January 31, 1989 until payment. The Creditors' Committee, on behalf of all Class 1 Creditors, shall receive a security interest in all assets of the DEBTORS to secure the June 30, 1989 payment, which security interest shall be subordinate to any held by the First Women's Bank and any other financial institution which may participate in the DEBTORS' Post – Confirmation financing. Said security interest shall be perfected by the Creditors' Committee and released upon the making of the June 30, 1989 payment.

5.2 Class 2 – Class 2 Creditors are impaired, and the holder thereof shall receive a distribution equal to one hundred (100%) percent of the Allowed amount of their respective Claims

pursuant to provisions of the Code, in full settlement release and discharge thereof, on the Consummation Date.

5.3 Class 3 – Class 3 Creditors are impaired. All interests of all Equity Holders of the DEBTORS are cancelled pursuant to Court Order dated September 27, 1988. Accordingly, the DEBTORS will issue 50% of the stock of the Reorganized DEBTOR to each of the two Guarantors.

ARTICLE VI

MEANS OF EXECUTION OF THE PLAN

6.1 The DEBTORS intend to implement the execution of this Plan by depositing the necessary funds in a segregated account at The First Women's Bank which meet the requirements of §345 of the Code, and such other requirements as are imposed by the Rules or the United States Trustee.

6.2 The DEBTORS intend to implement this Plan with Funds from the operations of its businesses.

ARTICLE VII

DISPUTED CLAIMS

7.1 Notwithstanding any of the provisions of the Plan, no distribution shall be made to the holder of any Claim unless and until such Claim is or becomes an Allowed Claim. On or before the Consummation Date the DEBTORS shall set aside in a separate interest-bearing escrow account, to be established and maintained by the DEBTORS in the "Disputed Claims Escrow Account", cash in such amount as would be required to be paid on the Consummation Date in respect of any Claim which is not an Allowed Claim as if the full amount of each such Claim were deemed to be an Allowed Claim, in accordance with the requirements recited in §6.1 herein.

7.2 As soon as practicable, but in no event later than ten (10) days following any such Claim becoming an Allowed Claim,

in whole or in part, the amount of cash then due to the holder of such Claim, plus interest from the date on which the Claim otherwise would have been paid, shall be paid and distributed to such holder. Thereafter, such holder shall be entitled to the treatment provided for all other holders of Class 2 Claims.

7.3 Upon any such Claim becoming a Disallowed Claim, in whole or in part, the cash reserve for the payment of the Disallowed Claim, shall become the unencumbered property of the DEBTOR.

ARTICLE VIII

EXECUTORY CONTRACTS AND UNEXPIRED LEASES

8.1 Any and all Executory Contracts or Unexpired Leases of the DEBTORS which are attached hereto as EXHIBIT "A", and have not heretofore been specifically rejected or assumed pursuant to an Order of the Bankruptcy Court or concerning which there is no application by the DEBTORS to reject pending before the Bankruptcy Court as of the Confirmation Date, are hereby specifically assumed. The Executory Contracts consist primarily of real property leases, licensee agreements, rental agreements and other miscellaneous contracts.

ARTICLE IX

CREDITOR'S COMMITTEE

9.1 As long as any payments or distributions required to be be made to holders of Allowed Unsecured Claims under this Plan remain unpaid, the Creditors' Committee shall be composed of such persons as presently constitute it and shall continue as such until all of such payments to holders of Allowed Unsecured Claims are made, at which time all powers of the Creditors' Committee shall terminate and it shall be deemed dissolved.

9.2 If any creditor represented on the Creditors' Committee shall assign its Claim or release the DEBTORS from the payment of the balance of its Claim, the member of the Creditors'

Committee representing that creditor shall be deemed to have resigned from the Creditors' Committee. In the event that a vacancy occurs on the Creditors' Committee by reason of the death of resignation of a member or because a member no longer represents the creditor which originally designated him, the vacancy thereby created shall be filled within thirty (30) days thereafter by that creditor. If the creditor fails to designate a successor to serve on the Creditors' Committee within such period, or if the resignation of a Creditors' Committee member shall result from the assignment or release of a Claim as aforesaid, then in any of such events, the remaining members acting by vote of a majority thereof, may at their sole option either (i) fill the vacancy with a representative of another Unsecured Creditor or (ii) reduce the size of the Creditors' Committee to the number of the remaining Creditors' Committee members, provided, however, that there shall never be less than five (5) members of the Creditors' Committee.

9.3 At any meeting of the Creditors' Committee, a majority of the Creditors' Committee shall constitute a quorum qualified to act, and the Creditors' Committee shall act by majority vote of those present. Meetings of the creditors' Committee shall be convened upon such notice as the Chairman of the Committee shall deem appropriate and necessary. Any member may designate a proxy for one or more meetings.

9.4 Neither the Creditors' Committee nor any of its members, agents or employees, nor the creditors represented by them shall, in any way be responsible for any of its acts or for the acts of any of its members, agents or employees, except that each member shall be personally responsible for his or its own act of willful misconduct or fraud.

9.5 The Creditors' committee and its members shall serve without compensation so long as the Creditors' Committee shall remain in existence, provided, however, that the Creditors' Committee and each member thereof shall be reimbursed by the DEBTORS for its or their reasonable expenses in connection with

the functioning of the Creditors' Committee, upon approval of the Court, including without limitation, the fees and expenses of any professionals retained by or subsequent to the Consummation Date in accordance with the provisions of the Code and Article herein.

ARTICLE X

RETENTION OF JURISDICTION

10.1 The Court shall retain jurisdiction of these cases pursuant to the provisions of Chapter 11 of the Code, until the final allowance or disallowance of all Claims affected by the Plan, and with respect to the following matters:

(a) To enable the DEBTORS to consummate all proceedings which it may bring prior to entry of the Confirmation Order, to set aside liens or encumbrances and to recover any transfers, assets or damages to which it may be entitled under applicable provisions of the Code or other Federal, State or Local law;

(b) To adjudicate all controversies concerning the classification or allowance of any Claim or equity security Interests;

(c) To hear and determine all Claims arising from the rejection of any executory contracts, including leases, and to authorize the rejection and termination of any executory contracts as to which an application for rejection or termination is filed prior to entry of the Order of Confirmation.

(d) To liquidate damages in connection with any disputed, contingent or unliquidated Claims;

(e) To adjudicate all Claims to a security or ownership interest in any property of the DEBTORS or proceeds thereof;

(f) To adjudicate all Claims or controversies arising out of any purchase, sales or contracts made or undertaken by the DEBTORS during the dependency of the within Chapter 11 case;

(g) To recover all assets and properties of the DEBTORS wherever located;

(h) To fix the allowance of compensation to all professionals retained, for services rendered during the Chapter 11 Proceedings;

(i) To determine such other matters for which provision is made in the Confirmation Order and for the purposes set forth in Section 1127(b) of the Code.

(j) To make such orders as are necessary or appropriate to carry out the provisions of this Plan, including but not limited to, orders interpreting, clarifying or enforcing the provisions thereof or determining whether or not an Event of Default has occurred.

ARTICLE XI

FUNDING OF PLAN

11.1 Prior to the Confirmation Date, the DEBTORS shall deposit in an interest bearing account at The First Women's Bank, the funds necessary to pay Class 1 and Class 2 Creditors who are required to be paid in cash on the Consummation Date (the "Cash Fund"). All interest accruing in the Cash Fund through the Consummation Date shall belong to and be paid over to the DEBTORS except as otherwise provided herein.

ARTICLE XII

COVENANTS OF THE DEBTORS

12.1 The DEBTORS shall (i) keep all of its respective properties adequately insured at all times with responsible

insurance carriers against loss or damage by fire and other hazards, and (ii) maintain adequate insurance at all times with responsible insurance carriers against liability on account of persons and property and under all applicable Workmen's Compensations laws.

12.2 The DEBTORS shall keep its properties in good repair, working order and condition and, from time to time, make all needful and proper repairs, renewals, replacements, additions and improvements thereto, so that the business carried on may be properly and advantageously conducted at all times in accordance with prudent business management.

12.3 The DEBTORS shall pay and perform promptly all of its respective obligations under the leases of real and personal property and service or other contracts, provided that it shall not be required to pay or perform any obligation under such leases and service or other contracts if such payment or performance is being contested in good faith and in appropriate proceedings and in respect of which adequate reserves have been established.

12.4 The DEBTORS shall comply in all material respects with the requirements of all applicable laws, rules, regulations and orders of any governmental authority relating to its business, provided that nothing herein contained shall require compliance with any law, rule, regulation or order if the legality or application thereof is being contested by the DEBTORS in good faith and by appropriate proceedings, and adequate reserves therefor have been established.

12.5 The DEBTORS agree to notify counsel to the Creditors' Committee of any action or proceeding against the DEBTORS or any of its property in arbitration or at law or in equity before any Federal or State Court or Governmental Commission, board or other administrative agency, or any arbitration "impartial chairman" wherein an unfavorable judgment, decision, order, ruling or finding would materially or adversely

affect the business, operations conditions, financial or otherwise, or income of the DEBTORS. Such notification shall be given to counsel to the Creditors' committee within ten (10) days from the time said action or proceeding is commenced.

12.6 The DEBTORS shall pay, in full, any and all current wages and taxes.

12.7 The DEBTORS shall pay no dividends.

12.8 The DEBTORS will make no loans or sales to officers, stockholders, employees or others, nor release or compromise any claims or debts owed to the Debtors by any officers, stockholders, employees or others without the written consent of the Creditors' Committee.

12.9 The DEBTORS shall maintain full, accurate and complete books of account in accordance with generally accepted accounting principles, which shall remain open to inspection by the Creditors' Committee or its agents or designee at all reasonable times.

12.10 The DEBTORS will not liquidate, dissolve or consent to a merger, acquisition or consolidation, without the written consent of the Creditors Committee.

12.11 The DEBTORS will not guarantee or otherwise in any way become responsible for obligations of any other person or entity.

12.12 Any investment made in the DEBTORS by any third party shall be subordinated to the rights of the creditors.

12.13 Any of the aforementioned covenants, generally or in any specific instance, may be modified or waived by a majority of the members of the Creditors' Committee called in accordance with the provisions of this Plan (hereinafter termed a "formal vote"). In the event no Creditors' Committee meeting is called

to consider such waiver, modification or consent, such waiver, modification or consent may be obtained by the assent of a majority of the members of the Creditors' Committee obtained by a poll of the Creditors' Committee, either in writing or by telephone (hereinafter termed an "Informal Vote"). Such an Informal Vote shall be conducted only by the Chairman or counsel to the Creditors' Committee.

12.14 This Plan shall be binding upon any successors or assigns of the DEBTORS.

ARTICLE XIII

EVENTS OF DEFAULT

13.1 In the event any of the following shall occur and be continuing: (a) at any time on or after the Consummation Date, the DEBTORS shall fail to pay any obligation due pursuant to the Plan on the date on which such obligation shall be stated to be due or to which it is extended pursuant to Article 3.3 and such obligation shall not be paid within thirty (30) days after such due date: or (b) the DEBTORS shall violate or fail to observe any of the covenants set forth in Article "XII" hereof and (i) shall, within ten (10) days fail to cure or (ii) shall, at the time of such violation or failure to observe, be incapable or curing within ten (10) days any such violation or failure to observe; or (c) the expiration of ten (10) days after the issuance of a Final Judgment against the DEBTORS or any of it subsidiaries for the payment of monies in excess of $10,000.00 satisfaction of which is not covered by adequate insurance (excluding any applicable deductible) and which remains unpaid for such period and as to which no stay of execution has been obtained or appeal; taken; or (d) the DEBTORS, or any of its subsidiaries shall file any petition in bankruptcy or seek Reorganization under any State or Federal Statute now or hereafter existing or shall become the subject of an Order for relief under Title 11 of the United States Code, shall be generally unable to pay its debts as they become due, shall make an assignment for the benefit of its creditors, or shall have a receiver or trustee appointed

to operate any of its businesses; then; and in each and every such case, every obligation of the DEBTORS under the Plan to make any payments on behalf of any person shall, any other provision of the Plan to the contrary notwithstanding, become immediately due and payable.

ARTICLE XIV

NOTICES

14.1 Except as otherwise herein provided, all notices required to be made in or under the Plan shall be in writing and shall be mailed by Registered Mail or Certified Mail, Return Receipt Requested.

1. If to the DEBTORS, c/o LESTER A. LAZARUS, P.C., 240 Madison Avenue, New York, New York 10016.

2. If to the Creditors' Committee, Attention: HAHN & HESSEN, 350 Fifth Avenue New York, NY 10118, Att: David Blejwas, Esq.

3. If to a creditor, at the address set forth on the DEBTORS' Schedules and on such creditor's Claim.

4. Any person may change the address at which he is to receive Notices for purposes of this Plan by sending written notice pursuant to this provision to the person to be charged with knowledge of such change. Furthermore, Notice shall be given to all of the above and their successors.

Dated: New York, New York
February 28, 1989

BEN COOPER, INC.
LIGHT MANUFACTURING CO., INC.
AIMWELL PRODUCTS, INC.
BEN COOPER SALES CORP.

BY: /s/
MICHAEL SHERMAN
Chief Executive Officer
Pursuant to Court Order

BEN COOPER, INC.
LIGHT MANUFACTURING CO., INC.
AIMWELL PRODUCTS, INC.
BEN COOPER SALES CORP.

BY: /s/
IRA D. COOPER

BEN COOPER, INC.
LIGHT MANUFACTURING CO., INC.
AIMWELL PRODUCTS, INC.
BEN COOPER SALES CORP.

BY: /s/
ROBERT COOPER

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- x

In re:	CASE NOS.:
BEN COOPER, INC.,	88 B 10484
LIGHT MANUFACTURING CO., INC.,	88 B 10547
AIMWELL PRODUCTS, INC.,	88 B 10546
BEN COOPER SALES CORP.	88 B 10770 (CB)

Debtors.
---------- x

ORDER CONFIRMING AMENDED CONSOLIDATION PLAN OF REORGANIZATION

The Amended Consolidated Plan of Reorganization referred to as (the "PLAN"), under Chapter 11 of the Bankruptcy Code, filed by BEN COOPER, INC., LIGHT MANUFACTURING CO., INC., AIMWELL PRODUCTS, INC., BEN COOPER SALES CORP., on February 28, 1989, and the PLAN having been transmitted to Creditors, and the Court having found:

1. That the PLAN has been accepted in writing by the Creditors whose acceptance is required by law; and

2. That the provisions of Chapter 11 of the Code have been complied with; that the PLAN has been proposed in good faith and not by any means forbidden by law; and

3. Each holder of a claim or interest will receive or retain under the PLAN, property value as of the effective date of the PLAN, that is not less than the amount that such holder would receive or retain if the DEBTORS were liquidated under Chapter 7 of the code on such date; and

4. All payments made or promised by the DEBTORS or by any other person for services or for costs and expenses, or in connection with, the PLAN and incident to the case, have been fully

disclosed to the Court and are reasonable or, if to be fixed after confirmation of the PLAN, will be subject to the approval of the Court; and

5. The identity, qualifications, and affiliations of the persons who are directors or officers of the DEBTORS', after confirmation of this PLAN, have been fully disclosed, and the appointment of such persons to such offices, or their continuance therein, is equitable, and consistent with the interests of the Creditors and Equity Security Holders and with public policy; and

6. The identity of any insider that will be employed or retained by the DEBTORS has been fully disclosed; and

7. Confirmation of the PLAN is not likely to be followed by the need for further financial Reorganization of the DEBTORS or any successor to the DEBTORS', under the PLAN; and

8. The Court hereby retains jurisdiction for such purposes as may be necessary or useful to aid the confirmation, consummation or implementation of the Plan and of the following additional purposes:

(a) To consider any modification of the Plan pursuant to §1127 of the Bankruptcy Code;

(b) To hear and determine:

(i) any objection to claims that may be pending at or initiated after confirmation;

(ii) all requests for compensation and/or reimbursement of expenses made by professionals which may be made after confirmation of the Plan;

(iii) any controversies, suits, disputes motion, and claims that may be pending at confirmation, or which may exist on behalf of the Debtor;

(iv) any applications or motions in connection with the liquidation of the Estate's Property which may be initiated prior to, or after confirmation.

(c) To enforce compliance with all obligations contained in the Plan and, if necessary, to effectuate payments required to be made under the Plan or hear and determine controversies and disputes arising under, or in connection with, the Plan.

IT IS ORDERED THAT:

The PLAN filed by BEN COOPER, INC., LIGHT MANUFACTURING CO., INC., AIMWELL PRODUCTS, INC., and BEN COOPER SALES CORP. on February 28, 1989, a copy of which PLAN is attached hereto, is confirmed.

Dated: New York, New York
April 4, 1989

/s/
U.S.B.J.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Case Nos.:
BEN COOPER, INC.,	88 B 10484
LIGHT MANUFACTURING CO., INC.,	88 B 10547
AIMWELL PRODUCTS, INC.,	88 B 10546
BEN COOPER SALES CORP.,	88 B 10770
Debtors.	Assigned to Hon. Cornelius Blackshear

BEN COOPER, INC.,

Plaintiff,

— against —

THE INSURANCE CO. OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Preliminary Statement

Defendant The Insurance Company of the State of Pennsylvania ("ICPA") wilfully and without justification seeks to terminate the liability insurance coverage of plaintiff-debtor Ben Cooper, Inc. (the "Debtor"). Waiting until the day the Debtor's confirmed Plan of Reorganization (the "Plan") became final and non-appealable, ICPA instituted an action in the Supreme Court of the State of New York seeking to terminate the Debtor's coverage — coverage which is essential for the Debtor to continue its business and comply with its obligations under the Plan.

ICPA's state court action should be stayed or removed to this Court, which has retained jurisdiction over the Debtor's affairs, and the insurance coverage should remain in place pending a determination of the issues in this adversary proceeding.

Facts

For a complete recitation of the relevant facts in this action, the Court is respectfully referred to the affidavit of Michael Sherman, sworn to May 8, 1989.

Argument

I. THE STATE COURT ACTION SHOULD BE STATED OR REMOVED

A. Pursuant to The Order Confirming The Debtor's Plan, The Bankruptcy Court Retains Jurisdiction Over This Dispute.

The order entered April 4, 1989 confirming the Debtor's Plan (the "Order") specifically provides that the Bankruptcy Court:

> 8. retains jurisdiction for such purposes as may be necessary or useful to aid the confirmation, consummation or implementation of the Plan and of the following additional purposes:
>
> * * *
>
> (b) To hear and determine:
>
> (i) any objection to claims that may be pending at or initiated after confirmation;
>
> * * *
>
> (c) To enforce compliance with all obligations contained in the Plan and, if necessary, to effectuate payments required to be made under the Plan or hear and determine controversies and disputes arising under, or in connection with, the Plan.

Although ICPA has commenced a declaratory judgment action in the state court (the "State Court Action") against the Debtor, this claim and dispute arose prior to confirmation of the Plan and is a dispute that must of necessity be litigated in the Bankruptcy Court by virtue of the Plan. The Bankruptcy Court has specifically retained jurisdiction to "hear and determine controversies and disputes arising under, or in connection with, the Plan" and which "may be necessary or uedful to aid in the confirmation, *consummation or implementation of the Plan*" (emphasis added).

ICPA apparently believes that the State Court Action should be litigated there, but the resolution of the dispute concerning the Debtor's insurance coverage will directly impact the Debtor's ability to consummate the Plan. If the Debtor is not recompensed for the extensive fire loss suffered and ICPA refuses to continue the Debtor's insurance coverage — including coverage of Debtor's manufacturing facilities — not only may the Debtor be unable to pay its creditors and consummate the Plan, but the Debtor may be unable to continue its business. The Plan specifically requires that the Debtor:

> keep all of its respective properties adequately insured at all times with responsible insurance carriers against loss or damage by fire and other hazards, and (ii) maintain adequate insurance at all times with responsible insurance carriers against liability on account of persons and property and under all applicable Workmen's Compensations laws. (Plan, page 17)

Loss of its insurance coverage will not only violate the Plan, but may render it impossible for the Debtor to continue its operations and the Debtor's ability to obtain financing is conditioned upon the continuation of full insurance coverage.

The purpose of the Bankruptcy Court is "to get the creditors paid and move the debtor quickly through liquidation or reorganization." *Pied Piper Casuals, Inc. v. The Insurance Company of the State of Pennsylvania (In re Pied Piper Casuals, Inc.)*, 50 Bankr. 549 (Bankr. S.D.N.Y. 1985). Permitting the State Court Action to proceed will have a crippling effect on consummation

of the Debtor's Plan and would make it virtually impossible for the Debtor to pay its creditors and move quickly through reorganization.

B. This is A Core Proceeding.

Section 157(b) of Title 28 of the United States Code provides that:

> (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
>
> (2) Core proceedings include, but are not limited to –
>
> (A) matters concerning the administration of the estate;
>
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11; . . .
>
> (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

Thus, 28 U.S.C. § 157(b) provides bankruptcy judges with authority to hear and finally determine "core proceedings, arising under title 11, or arising in a case under title 11."

As explained in *Lesser v. A-Z Associates* (*In re Lion Capital Group*), 46 Bankr. 850, 856 (Bankr. S.D.N.Y. 1985), "the constitutional ability of an adjunct bankruptcy court to determine state law issues is to be determined by the nature and extent of control by Article III courts and whether there is a nexus "between the proceeding involving a state law cause of action and the bankruptcy estate." As aptly stated in *In re Wood*, 52 Bankr. 513 (Bankr. Ala. S.D. 1985), in reliance on *Lion Capital*, Congress clearly intended that "bankruptcy judges be empowered to hear a broad range of matters subject to the substantial controls of an Article III court."

The broad reach of the bankruptcy court is further supported by 28 U.S.C. § 157(b)(3) which provides that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by state law." In fact, many bankruptcy courts have relied on this section to hold that an action, even if based solely on state law, is a core proceeding if the action is necessary to carry out the central purposes of bankruptcy. *See, e.g., Franklin Computer Corp. v. Harry Strauss & Sons* (*In re Franklin Computer Corp.*), 50 Bankr. 620 (Bankr. E.D. Pa. 1985); *Baldwin-United Corp. v. Thompson* (*In re Baldwin-United Corp.*), 48 Bankr. 49 (Bankr. S.D. Ohio 1985).

The importance of the state law proceeding to the bankruptcy case justifies its treatment as a core proceeding, where it seeks recovery of assets whose prompt collection is essential to payment of creditors and the success of the reorganization. In effect, the state law nature of claims becomes irrelevant is overshadowed by the pressing needs of the creditors and the estate. *See, e.g., Franklin Computer Corp. v. Harry Strauss & Sons* (*In re Franklin Computer Corp.*), 50 Bankr. 620 (Bankr. E.D. Pa. 1985).

In *Campbell Enterprises, Inc. v. United States* (*In re Campbell Enterprises, Inc.*), 66 Bankr. 200 (Bankr. D.N.J. 1986), a case in which the debtor sought to enjoin the Internal Revenue Service from assessing or collecting a 100% tax penalty, the court held that where the assessment and collection of the penalty "will

potentially impact upon the reorganization of the debtor," the bankruptcy court, pursuant to 28 U.S.C. § 157(b), has jurisdiction over the matter.

Similarly, in the present case, the disposition ot the State Court Action "will potentially impact upon the reorganization of the debtor" and consummation of the Plan and thus, the bankruptcy court is the proper forum to hear this matter.

Here, almost immediately upon confirmation of the Plan, ICPA commenced its State Court Action. Not only is this a "core" proceeding pursuant to 28 U.S.C. § 157(b) because there is a strong nexus between this case and the bankruptcy estate, but as stated previously it is in direct contravention with the Plan.

There is every reason why the bankruptcy court should decide the Debtor's dispute with ICPA. In the interests of the speedy payment of creditors' claims and the rehabilitation of the Debtor, this core proceeding should be decided by the bankruptcy court. Not only will the outcome directly affect the Debtor's estate and consummation of the Plan, but an expeditious determination is essential to the Debtor and its creditors.

C. This Proceeding Is a Related Proceeding.

At the very least, this Court should hear and determine this proceeding as a "related" proceeding under 28 U.S.C. § 157(c). Section 157(c)(1) and (2) provides that:

> (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed finds of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
>
> (2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer

> a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

Although this section does not define a related proceeding, Chief Justice Burger's commentary in his dissenting opinion in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), has been widely accepted as a basis for identifying the small number of claims that cannot be heard and determined by bankruptcy courts. Chief Justice Burger commented that "a 'traditional' state common-law action, not made subject to a federal rule of decision, and related *only peripherally* to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an 'Article III court' if it is to be heard by any court or agency of the United States." *Id.*, 458 U.S. at 92 (Burger, C.J., dissenting) (emphasis added).

In *In re Wedtech Corp.*, 72 Bankr. 313, 315-6 (Bankr. S.D.N.Y. 1987), the court held that an action is related to a bankruptcy "if the outcome could alter the debtor's rights, liabilities, opinions, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate." In *Wedtech*, the court explained that there was a sufficient nexus between the bankruptcy proceeding and the dispute over certain letters of credit making the dispute within the bankruptcy court's jurisdiction "far beyond the mere presence of 'common issues of fact.' " *Id.* at 316.

The insurance dispute is, at the very least, "related" to the bankruptcy case because the disposition of this dispute is integrally connected to the Debtor's ability to pay its creditors in accordance with the Plan. As such, the dispute must be heard by the bankruptcy court.

If ICPA proceeds with its State Court Action and is further allowed to terminate the Debtor's insurance policy, this will negatively impact on the consummation of the Plan. Moreover, there is a sufficient nexus between the bankruptcy proceeding and the State Court Action, making the issues involved in the State Court Action within the bankruptcy court's jurisdiction.

II. THE DEBTOR'S INSURANCE POLICY MUST REMAIN IN EFFECT AND MUST CONTINUE TO COVER THE DEBTOR'S MANUFACTURING FACILITIES

ICPA also seeks in the State Court Action to terminate the Debtor's insurance policy. If the Debtor's insurance coverage is terminated or, if it does not cover the manufacturing facilities at the Debtor's place of business, then the Debtor will be unable to meet the required obligations of its business and will be unable to consummate the Plan.

In *Pied Piper Casuals, Inc. v. The Insurance Company of the State of Pennsylvania (In re Pied Piper Casuals, Inc.)*, 50 Bankr. 549 (Bankr. S.D.N.Y. 1985), the trustee brought an action against the same defendant herein, upon an insurance policy seeking reimbursement for losses due to theft. The court held that "an action on an insurance policy either is, or bears a strong similarity to, a turnover proceeding which Congress has expressly included in its open-ended definition of core proceedings." The court further held that "[r]ecovery on insurance policies that nearly all debtors possess when entering bankruptcy are generally essential to achievement of the overall purposes of the bankruptcy court system and the Code: quick and equitable marshalling of the estate's assets, speedy liquidation and payment of creditors' claims or rehabilitating the debtor." *Id.* at 551. Moreover, "[c]ollection of insurance proceeds like that of other matured debts [are matters] which Congress intended the bankruptcy courts to hear and determine under § 157(b). An action on such collection should not be shunted off to crowded district court and state court calendars thereby frustrating these ends." *Id.* at 552.

ICPA must keep the Debtor's insurance policy in tact, pending the final determination of this action, including maintaining coverage of the Debtor's manufacturing facilities. If the insurance coverage remains in place, the Plan can be consummated, the Debtor will be able to continue its business and all creditors will be paid expeditiously.

ICPA now claims that it was never informed that the Debtor was using one of its insured premises as a manufacturing facility and thus, the insurance policy should be declared void from its inception. However, the Debtor fully informed Kalvin-Miller International, Inc. and Kerwick & Curran, Inc. (ICPA's agent) prior to procuring the policy, of all relevant information regarding its business, including the fact that it has manufacturing facilities, which were to be covered by the policy. The Debtor continued its business operation in reliance on such insurance coverage and ICPA cannot claim now, over seven months later, that it did not know that the Debtor was using its premises for manufacturing. Such a claim is patently unfair and would unduly prejudice the Debtor, its estate and its creditors. Declaring the insurance policy void from its inception would totally undermine the Debtor's ability to pay its creditors pursuant to the Plan and cannot be permitted.

Conclusion

For the foregoing reasons, the Debtor's motion for a temporary restraining order and a preliminary injunction should be granted.

Dated: May 8, 1989

LOWENTHAL, LANDAU, FISCHER
& ZIEGLER, P.C.

By: /s/Lawrence L. Ginsburg
Lawrence L. Ginsburg

250 Park Avenue
New York, New York 10177
(212) 986-1116
Attorneys for Debtor
Ben Cooper, Inc.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

	Case Nos.:
BEN COOPER, INC.,	88 B 10484
LIGHT MANUFACTURING CO., INC.,	88 B 10547
AIMWELL PRODUCTS, INC.,	88 B 10546
BEN COOPER SALES CORP.,	88 B 10770

Debtors.
---------- X

BEN COOPER, INC.,

Plaintiff,

Assigned to Hon. Cornelius Blackshear

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Defendants.
---------- X

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEBTOR'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Preliminary Statement

In opposition to the motion of Ben Cooper, Inc. (the "Debtor") for a temporary restraining order and preliminary injunction staying the state court action commenced by defendant The Insurance Company of the State of Pennsylvania (the "Insurance Company") and preventing the Insurance Company from cancelling Debtor's insurance coverage since its inception, the Insurance Company relies on a misrepresentation of the applicable facts and a perversion of the applicable state and bankruptcy laws. Its opposition should be rejected and Debtor's

motion for a temporary restraining order and preliminary injunction should be granted pending the determination of the adversary proceeding.

The Facts

This Court is respectfully referred to the Reply Affidavit of Michael J. Sherman, sworn to May 17, 1989, for clarification and correction of the numerous factual distortions contained in the Insurance Company's Memorandum of Law.

Argument

I. THE INSURANCE COMPANY IS BOUND BY THE TERMS OF THE INSURANCE BINDER

In its Memorandum of Law, the Insurance Company argues that it is not bound by the binder insurance policy (the "Policy" — annexed as Exhibit C to Affidavit of Michael J. Sherman, sworn to May 8, 1989) because neither Kalvin-Miller International, Inc. nor Kerwick & Curran, Inc. ("Kerwick & Curran") were the Insurance Company's "agents" but were agents of Debtor. This argument flies directly in the face of long-standing and fundamental New York insurance law.

It is well settled that an insurance company is "bound by a person issuing a binder under apparent authority." 68 N.Y. Jur.2d, *Insurance*, §674 at 783. In *Schlesinger v. Columbian Fire Ins. Co.*, 37 A.D. 531, 56 N.Y.S. 37 (1st Dep't 1899), the defendant insurance company tried to avoid its liability under a "binder" policy claiming that it had never authorized the agent to issue "binders" on its behalf and thus it was not bound by such "binders". *Id.* 56 N.Y.S. at 38. The First Department ruled that the insurance company was bound by the "binders" entered into by its apparent agent, stating that receipt and acceptance of premiums was sufficient "recognition" of the agent's authority. *Id.* 56 N.Y.S. at 39.

Indeed, an agent or broker's acceptance of payment from the insured establishes a conclusive presumption that such payments bind the insurer. *Bohlinger v. Mayville Realty Co.*, 135 N.Y.S.2d 865, 867 (Sup. Ct. N.Y.Co. 1954), *aff'd*, 255 A.D. 1045, 141 N.Y.S.2d 509 (1st Dep't 1955); *Central Surety & Ins. Corp. v.*

Marro, 71 N.Y.S.2d 815 (1947). Furthermore, an insurer will be estopped from denying its relationship with an agent when the insurer knowingly permitted the agent to hold himself out as such. *Abbott v. Prudential Ins. Co. of America*, 281 N.Y. 375, 378, 24 N.E.2d 87 (1939); 68 N.Y. Jur.2d, *Insurance*, §415 at 518.

Under the circumstances of this case, it could not be clearer that Kerwick & Curran were "agents" for the Insurance Company and, therefore, that the Insurance Company was bound by the Policy. The Policy states on its face that it was "bound by Lester Edelman" of Kerwick & Curran. The Policy stated that it was effective as of October 1, 1988 and the first premium was paid to Kerwick & Curran on September 28, 1988 (Exhibit A to Affidavit of Michael J. Sherman, sworn to May 8, 1989).

The Debtor paid its premiums and received the Policy – "bound" by Kerwick & Curran. How can the Insurance Company now claim that it is not bound by the Policy – but is instead bound by a "policy" the Insurance Company sent to its *own* agent, Kerwick & Curran, nearly two months after the Policy's effective date (and after Debtor had fully paid the premiums), and which was not delivered to Debtor until *after* the fire loss?

The Insurance Company's position is specious. It cannot permit Kerwick & Curran to "bind" policies and collect premiums on its behalf and then, after a loss covered by the Policy, claim that it is not bound by the acts of its agent. The Insurance Company's position should be rejected.

II. THE BANKRUPTCY COURT HAS RETAINED AND SHOULD EXERCISE JURISDICTION OVER THIS MATTER

"The Bankruptcy Court's equitable powers are necessarily quite broad and flexible so that the Court may fashion appropriate relief." *In re Parr*, 1 B.R. 453, 456 (Bankr. E.D.N.Y. 1979). Thus, the jurisdiction of the Bankruptcy Court does not automatically terminate upon confirmation of a Chapter 11 plan of reorganization. *In re Food Fair Stores, Inc.*, 16 B.R. 387, 390 (Bankr. S.D.N.Y. 1982); *In re Sultan Corp.*, 81 B.R. 599, 602 (B.A.P. 9th Cir. 1987). In general, reorganization courts,

subsequent to confirmation, retain jurisdiction over the debtor's affairs *as specified* in the plan of reorganization or *in the order confirming the plan. In re KDI Corp.*, 14 B.R. 350, 355 (Bankr. S.D. Ohio 1981) (emphasis added).

Here, by express and unequivocal language, this Court has retained jurisdiction over the very claims at the heart of the dispute between Debtor and the Insurance Company. Paragraph 8 of the order confirming the plan provides as follows:

> 8. The Court hereby retains jurisdiction for such purposes *as may be necessary or useful to aid the confirmation, consummation or implementation of the Plan* and of the *following additional purposes:*
>
> * * *
>
> (b) To hear and determine:
>
> * * *
>
> (iii) *any controversies, suits, disputes, motion and claims that may be pending at confirmation,* or which may exist on behalf of the Debtor;
>
> (c) To enforce compliance with all obligations contained in the Plan and, if necessary, to effectuate payments required to be made under the Plan or *hear and determine controversies and disputes arising under, or in connection with, the Plan* [emphasis added].

This adversary proceeding squarely comes within this Court's express retention of jurisdiction — resolution of the dispute "may be necessary or useful to aid the confirmation, consummation or implementation of the Plan"; the adversary proceeding involves a "controversy" or "dispute . . . pending at confirmation"; and such a "controversy" or "dispute" arises "under or in connection with, the Plan."

In *In re Tacoma Boatbuilding Co.*, 81 B.R. 248 (Bankr. S.D.N.Y. 1987), the Court noted that it retained jurisdiction over

the subject adversary proceeding notwithstanding confirmation of the plan where (as here) the plan provided that the Court should retain jurisdiction for the purposes of determining all applications, adversary proceedings, and litigated matters pending upon confirmation. *Id.*, n. at 250.

As in *In re Tacoma*, this Court expressly retained jurisdiction over a broad range of matters, of which this dispute is certainly one. The exercise of jurisdiction by this Court is, therefore, proper and required.*

III. THE INSURANCE COMPANY IS NOT ENTITLED TO A JURY TRIAL

After first asking this Court to accept its argument that this dispute is merely a "related" proceeding (which ignores the express language of the order confirming the plan, not to mention the "core" nature of the dispute), the Insurance Company then reasons that since it would request a jury trial in its state court action "at the appropriate time", this Court is without jurisdiction (citing 28 U.S.C. §157(c)(1)). Even accepting the Insurance Company's erroneous argument that this is merely a "related" proceeding, its position is still indefensible because it *would not* be entitled to a jury trial in state court at *any* time.

In its state court complaint, the Insurance Company asserts three causes of action against Debtor – the first seeks rescission of the Policy and a "declaration that it has no liability thereunder"; the second and third causes of action also seem to seek a declaration of non-liability. The gravamen of the three causes of action is clearly rescission of the Policy. The state court complaint seeks no money damages.

To determine whether a party is entitled to trial by jury of state law claims, the court must examine the nature of the

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* Notwithstanding this Court's order confirming the Plan, as discussed fully in Debtor's initial Memorandum of Law, even if by its order this Court did not expressly retain jurisdiction over the dispute, as a "core" proceeding this Court would nevertheless be required to exercise jurisdiction. Furthermore, this Court could hear and determine this case as a "related" proceeding.

claims and the relief sought. *Nobile v. Pension Committee of Pension Plan*, 611 F.Supp. 725 (S.D.N.Y. 1985), *citing*, *Ross v. Bernhard*, 396 U.S. 531 (1970). The bringing of a declaratory judgment action is not itself determinative of a party's entitlement to a jury trial. "That determination requires an analysis of the legal or equitable nature of the traditional form of action which would most likely have been employed had a declaratory judgment action not been available." *Martell v. North River Ins. Co.*, 107 A.D.2d 948, 484 N.Y.S.2d 363, 365 (3d Dep't 1985).

The nature of the state court action – rescission of an insurance policy – is clearly equitable in nature. In *Phoenix Mutual Life Co. v. Conway*, 11 N.Y.2d 367, 183 N.E. 2d 754, 229 N.Y.S.2d 740 (1962), an action by an insurer to rescind an insurance policy, the New York Court of Appeals addressed this very issue. In denying a jury trial to the beneficiaries of the insurance policy, the Court stated: "Since the plaintiff brought an action in equity for rescission, *an action unquestionably triable by a Court without a jury*, the defendants do not become entitled . . . to a trial by jury." *Id.* 229 N.Y.S.2d at 742 (emphasis added). *See also Camrex (Holdings) Ltd. v. Camrex Reliance Paint Co., Inc.*, 90 F.R.D. 313, n. at 324 (E.D.N.Y. 1981).

Similarly, the Insurance Company's state court action, which seeks rescission of the Policy, is unquestionably triable by a court without a jury. The cases cited by the Insurance Company in its Memorandum of Law both involve claims *at law* and not of an equitable nature. *Cf. In re Newman Brewing Co., Inc.*, 87 B.R. 236 (Bankr. S.D.N.Y. 1988) (Debtor's action for money damages due to breach of contract); *Pied Piper Casuals, Inc. v. Ins. Co. of the State of Pennsylvania*, 72 B.R. 156 (S.D.N.Y. 197) (action by insured for money damages).* In fact, the only

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* Though the Insurance Company makes much of Debtor's inadvertent failure to cite the reversal of *Pied Piper Casuals, Inc. v. The Insurance Company of Pennsylvania*, contrary to what the Insurance Company would have this Court believe, Debtor hardly relies "solely" on *Pied Piper*. Indeed, the case is cited once in support of the general purpose of the bankruptcy court

(Footnote continued)

reason there was any question about this Court's ability to conduct a jury trial in *Pied Piper* was the fact that the Court deemed *Pied Piper* a "related" proceeding; even so, contrary to the Insurance Company's argument, the Court did not rule that a bankruptcy court could never conduct a jury trial. Indeed, there is no question that this Court could conduct a jury trial where the proceeding was a "core" proceeding or where (as here), the Court specifically retains jurisdiction over disputed matters.

Thus, the Insurance Company's argument that this Court does not have jurisdiction because it will seek a jury trial in state court is disingenuous at best. Since it could *not* have a jury trial in state court, the Insurance Company can most certainly not use its non-right to deprive this Court of its proper jurisdiction.

IV. THE DEBTOR WILL SUFFER IRREPARABLE HARM

The Insurance Company asserts that its cancellation of Debtor's Policy will not cause "irreparable harm" and that, therefore, Debtor's motion for injunctive relief should be denied. Once again, the Insurance Company misstates the facts and misapplies the law.

" 'Irreparable harm' means injury for which a monetary award cannot be adequate compensation. The expected harm must be adequately presented as 'not remote or speculative but . . . actual and imminent.' " *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F.Supp. 57, 68 (S.D.N.Y. 1981) (citations omitted). Under these standards, Debtor has clearly shown that it will be irreparably harmed if the Insurance Company is not enjoined from cancelling the Policy.

(Memorandum of Law, p. 4) and later is used as an example of a core proceeding, *not* as Debtor's sole authority for any proposition.

Even so, the decision reversing the cited case still determined that the Bankruptcy Court should retain jurisdiction over the action as a "related" proceeding. 65 B.R. at 781.

By commencing the state court action, asserting fraud on the part of Debtor, the Insurance Company has made it extremely difficult, if not impossible, for Debtor to obtain substitute insurance. Despite diligent efforts, Debtor has been unable to do so (*see* Affidavit of Michael J. Sherman, sworn to May 17, 1989, ¶12).

Pursuant to the plan of reorganization, Debtor is *required* to maintain insurance covering its properties. Cancellation of the Policy, with no ready substitute, would seriously impinge Debtor's ability to carry out its obligations under the plan and would threaten the plan's 100% payment to the creditors.

Debtor has adequately demonstrated actual and imminent irreparable harm, for which money damages would be insufficient; its motion for injunctive relief should be granted.

V. THE DEBTOR DID NOT VIOLATE ITS DUTY TO DISCLOSE

The Insurance Company's claim that Debtor failed to disclose adequate information to its creditors is likewise without merit. Section 1125 of the Bankruptcy Code defines "adequate information" as "information of a kind and in sufficient detail . . . that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan. . . ." *See In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988) (debtors are required to transmit adequate information to allow creditors to make an informed judgment concerning the plan); *In re Monroe Well Service, Inc.*, 80 B.R. 324, 329 (Bankr.. E.D. Pa. 1987) (primary purpose of Chapter 11 plan disclosure statement is to give creditors adequate information necessary for them to decide whether to accept proposed plan); *In re Egan*, 33 B.R. 672, 675 (Bankr. N.D. Ill. 1983) (disclosure statement is intended to be source of factual information upon which one can make informed judgment about reorganization plan).

In this context, it is clear that Debtor did not fail to disclose anything. Pursuant to the plan, Debtor's payments to creditors

were to be financed; thus, its ability to meet its obligations under the plan were not dependent on resolution of the insurance claim.

Furthermore, Debtor had no reason to believe that the Insurance Company was poised to disclaim coverage on the heels of approval of the plan. Debtor assumed (incorrectly, as it turns out) that the Insurance Company was dealing in good faith with respect to its claimed loss.

Thus, Debtor provided its creditors with all the information necessary to creditors and available to Debtor in order for the creditors to make informed judgments concerning the plan. The Insurance Company's argument should be rejected.

Conclusion

For the foregoing reasons, Debtor respectfully requests that its motion for a temporary restraining order and preliminary injunction be granted.

Dated: May 17, 1989

LOWENTHAL, LANDAU, FISCHER
& ZIEGLER, P.C.

By: /s/Lawrence L. Ginsburg

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

BEN COOPER, INC.,

Plaintiff,

v. M 47

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Defendants.
---------- X

July 11, 1989
11:30 a.m.

Before:

HON. LOUIS L. STANTON

District Judge

ORAL DECISION

APPEARANCES

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VICTORIA A. STEWART

(In open court)

THE COURT: Based on the written submissions and the oral arguments of counsel, it is clear to me that the adversary proceeding commenced on May 9, 1989, by Ben Cooper, Inc., against the Insurance Company of the State of Pennsylvania, Kalvin-Miller International, Inc., and Kerwick & Curran, Inc., is not a core proceeding under 28 U.S. Code Section 157.

Core proceedings are those within bankruptcy cases which seek the creation, recognition, determination or adjudication of rights which do not exist independently from Title 11 or the bankruptcy case itself.

Stated differently, core proceedings are those which spring from the operation and application of the bankruptcy code itself. It is a term which is meant to encompass those proceedings which would not exist in the absence of the bankruptcy code.

In contrast, non-core or related proceedings are those which could have been brought in the district court or state court had there been no bankruptcy case filed. They exist irrespective of the fact of the bankruptcy.

The adversary proceeding here raises only state law issues, primarily whether the insurance company is liable for the losses sustained in a fire at a Rossville, Georgia plant, and if the insurance company is not liable, whether Kalvin-Miller or Kerwick & Curran are liable.

Now, of course, the outcome of that proceeding may have an economic impact on the consummation of the plan which has been approved by Judge Blackshear on April 4, but it does not follow that it is therefore a core proceeding under either Section 157(b)(2)(A) which refers to matters concerning the administration of the estate, or section 157(b)(2)(L) which concerns confirmations of plans, and to hold that it is a core proceeding under either of those clauses would read those clauses too broadly.

An action is not a core proceeding simply because its outcome can result in funds being brought into the estate. Rather, that connection makes it a related proceeding. In the Blue Point Carpet case the court pointed out that even where a breach of contract action is necessary to fund a reorganization, treatment of the matter as a core proceeding is unjustified since otherwise even the Marathon case would have constituted a core proceeding, and under that construction the bankruptcy amendments of 1984 would be as unconstitutional as was the predecessor statute.

The proceeding not being a core proceeding, it cannot be rendered a core proceeding by any provisions of the plan. This raises the question whether the reference to the bankruptcy court should be withdrawn. Title 28 United States Code Section 157 (d) states that a district court may withdraw in whole or in part any proceeding referred to under that section on timely motion of any party for cause shown.

The propriety of withdrawal in this case centers on the dispute whether the defendants are entitled to a jury trial in the adversary proceeding. Ben Cooper's complaint in the adversary proceeding contains three counts. The first seeks a judgment that the policy issued by the insurance company is still in effect and that the insurance company is liable for Ben Cooper's losses sustained in the fire at the Rossville, Georgia plant. It seeks damages of $2 million and punitive damages of $5 million.

The second and third counts respectively argue that Kalvin Miller and Kerwick & Curran were negligent in the roles that they played in helping Ben Cooper obtain insurance. The defendants' answers contain jury demands.

The defendants are entitled to a jury trial with respect to at least some of the debtor's claims and their affirmative defenses. The majority of cases hold that Congress did not intend that bankruptcy judges preside over jury trials in non-core proceedings, since the requirement of de novo review in a district court would be incompatible with the conduct of a jury trial in the bankruptcy court. Review in the district court would then

have to be by a de novo jury trial, leading to a meaningless duplication.

The necessity of preserving the defendants' right to a jury trial in this non-core proceeding constitutes good cause for withdrawal of the reference under 28 U.S. Code Section 157 (d). The reference being withdrawn, the question is whether the district court should abstain from hearing the matter and allow it to proceed in the state court.

The relevant statute, 28 United States Code Section 1334(c)(2), provides that the district court shall abstain from hearing a non-core proceeding based on a state law or a state law cause of action if an action has been commenced in the state court and that action can be timely adjudicated in a state forum of appropriate jurisdiction.

Section 1334(c)(1) permits a district court to abstain from hearing either a core or a non-core proceeding in the interests of justice or in the interests of comity with state courts or respect for state law.

As I have mentioned, the adversary proceeding here is a non-core proceeding which raises only state law issues. Pursuant to Judge Blackshear's orders, the parties have already conducted expedited discovery which pertains both to the adversary proceeding and to the pending state court action. There has been no showing that timely adjudication is not available in the state court, and this court will abstain from hearing the adversary proceeding.

The final matter relates to the bankruptcy court's preliminary injunction which on May 24 prohibited the insurance company from cancelling its policy with Ben Cooper and prosecuting its state court action.

In this circuit the standard for preliminary injunctive relief requires a showing of irreparable harm and either the likelihood of success upon the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and

a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

At this stage Ben Cooper's likelihood of success on the merits with respect to the insurance company's cancellation of its policy is at best a wide open question. There is no persuasive showing that it has a likelihood of success on the merits at this point. It may prevail or it may not. There are certainly sufficiently serious questions going to the merits to make them a fair ground for litigation.

As far as the balance of hardships is concerned, these tip in favor of the insurance company, not in favor of Ben Cooper. Unlike Judge Blackshear, I do not see how the insurance company's cancellation of its policy would jeopardize Ben Cooper's ability to pay out to its creditors. If the insurance company cancelled the policy today, such an action should have no effect on Ben Cooper's collecting $2 million or $5 million if it is entitled to do that from the insurance company for the January fire, nor would it increase otherwise, or decrease the assets available to Ben Cooper to pay its creditors.

However, by way of the injunction, the insurance company is presently being held to a risk which it says it never contracted to underwrite and for which it is receiving an inadequate premium. Ben Cooper argues that it will be difficult and may be impossible for it to obtain other insurance because of its financial situation as well as because of the insurance company's charges of deceit in the state court action. However, that is problematical. In any event, that situation has not been established as one with which it is just to tax the insurance company.

Even if it is the case that no other company wishes to assume the Ben Cooper risk, that does not justify inflicting that risk on this insurance company merely because Ben Cooper has covenanted with its creditors that it will maintain insurance on its property. The obtaining of that insurance should be left to open market forces.

Accordingly, that portion of the bankruptcy court's order of May 24, 1989, preventing the insurance company from cancelling

its insurance policy is vacated. In light of my decision to abstain from hearing the non-core adversary proceeding commenced by Ben Cooper, the remaining portion of the May 24, 1989 order which enjoins the insurance company from prosecuting the state court action is also vacated.

Is there anything further on this case?

MR. GINSBURG: Your Honor?

THE COURT: Yes.

MR. GINSBURG: In the event that Ben Cooper decides to appeal from this decision, assuming it is appealable, what would the form of request for a stay of your Honor's order —

THE COURT: I am sure it would be whatever the federal rules provide.

MR. GINSBURG: I would ask you now, then, preliminarily for a stay of your order to admit an emergency appeal to the Second Circuit.

THE COURT: I will grant you a 24-hour stay to explore your remedies and file whatever papers you wish to file.

MR. GINSBURG: Thank you. May I request a stay until the close of business tomorrow?

THE COURT: Yes.

(Proceedings adjourned)

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT

See A-1 of Petition for Writ of Certiorari